Supreme Court, U.S.
FILED

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No. ___

IN THE

Supreme Court of the United States

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

ROBERT W. KASTENMEIER
2800 North 27th Street
Arlington, VA 22207
(703) 525-7484

MICHAEL J. REMINGTON
DRINKER, BIDDLE & REATH LLP
1500 K Street NW, Suite 1100
Washington, DC 22205-1209
(202) 842-8839

JOHN S. SKILTON *
CHRISTOPHER G. HANEWICZ
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703-5118
(608) 663-7460

MARK A. FRANKEL
LAFOLLETTE GODFREY & KAHN
One East Main Street, Suite 500
Madison, WI 53701-2719
(608) 257-3911

Counsel for Petitioners

* Counsel of Record

October 7, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

Petitioners* seek certiorari review on two questions:

1) In light of the vital public interest in preserving confidence in an impartial judiciary, does the Petition Clause of the First Amendment to the United States Constitution preclude a court from sanctioning a party moving to vacate one of its decisions based upon a claim of judicial partiality or the appearance thereof without first determining that the motion was objectively meritless?

2) Before a state court of last resort can sanction an attorney for filing a motion in that court in bad faith and for an improper purpose, does the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that court to afford the accused attorney an opportunity to respond and be heard?

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* With respect to the first question presented, "Petitioners" include attorney Edward R. Garvey and the law firm of Garvey & Stoddard, S.C., as well as their clients, Warner Jackson, Carl Gobel, Father Thomas Mueller and Wendell Harris. With respect to the second question presented, "Petitioners" include only attorney Garvey and the law firm; because the court reversed the sanctions order against their clients, those individuals do not join in the petition on the second question presented.

PARTIES TO THE PROCEEDING

In addition to the parties stated in the caption, the following parties are petitioners in this proceeding:

Garvey & Stoddard, S.C.
Wendell Harris
Carl A. Gobel
Warner Jackson
Father Thomas J. Mueller

In addition to the parties stated in the caption, the following parties are respondents in this proceeding:

John T. Benson, Superintendent of Public Instruction
Department of Public Instruction
James E. Doyle
Marquelle Miller
Cynthia Miller
Angela Gray
Zachery Gray
Shon Richardson
George Richardson
Latrisha Henry
Faye Henry
Reigne Barrett
Valerie Barrett
Candice Williams
Senton Williams
Clintrai Giles
Sharon Giles

CORPORATE DISCLOSURE STATEMENT

Neither petitioner has a parent corporation or issues stock; and, thus, no publicly held corporation owns 10 percent or more of petitioners' stock.

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Warner Jackson, Carl Gobel, Father Thomas Mueller, Wendell Harris and attorney Edward R. Garvey and the law firm of Garvey & Stoddard, S.C. (hereinafter "Petitioners"), respectfully petition for a writ of certiorari to review the July 9, 2002 order and February 19, 2002 opinion and order of the Wisconsin Supreme Court.

OPINIONS BELOW

The original opinion of the Wisconsin Supreme Court (App. 1a-13a) granting sanctions was entered on February 19, 2002, and is published at 2002 WI 14, 249 Wis. 2d 681, 639 N.W.2d 545. The order denying Petitioners' motion for reconsideration of that decision (App. 14a-26a) was entered on July 9, 2002, and is published at 2002 WI 90, 647 N.W.2d 815.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) as the questions presented in this case involve the right to petition and the right to due process of law provided under the First and Fourteenth Amendments to the United States Constitution respectively.

STATUTES INVOLVED

This case involves the interpretation and application of the First and Fourteenth Amendments, which provide in relevant part:

First Amendment

> Congress shall make no law . . . abridging the freedom of speech . . . or of the right of the people . . . to petition the Government for a redress of grievances.

Fourteenth Amendment

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . . .

INTRODUCTION

On January 8, 2002, Petitioners brought a Motion to Vacate the Wisconsin Supreme Court's "school choice" decision (*Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (Wis. 1998), *cert. denied sub nom. Gilbert v. Moore*, 525 U.S. 997 (1998) ("*Jackson I*")) on the grounds that the decision was void because one of the justices who had participated, the Honorable Jon P. Wilcox, should have recused himself. The Motion to Vacate was based on evidence from an investigation by the Wisconsin Elections Board, which established that during the election campaign to the Wisconsin Supreme Court immediately preceding *Jackson I*, Justice Wilcox's campaign had received illegal campaign contributions from pro "school choice" groups.

In a decision dated February 19, 2002 (four justices constituting the majority, two justices (including Justice Wilcox) not participating, and the Chief Justice dissenting (without opinion, on the sanctions order alone)), the Wisconsin Supreme Court denied the Motion to Vacate and, in part II of its decision, sanctioned Petitioners for bringing the motion, awarding the State of Wisconsin its attorney's fees and costs. *Jackson*, 249 Wis. 2d at 686, 697, 639 N.W.2d at 547, 553 ("*Jackson II*"). Although the court did not address the substance of Petitioners' challenge,[1] it nevertheless concluded

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[1] In its February 19, 2002 decision, the Wisconsin Supreme Court relied on *City of Edgerton v. Gen. Cas. Co.*, 190 Wis. 2d 510, 527 N.W.2d 305 (Wis. 1995), to the effect that the original plaintiffs had waived any challenge to the impartiality of Justice Wilcox. *Jackson II*, 249 Wis. 2d at 692-94, 639 N.W.2d at 550-51. That rationale was directly challenged by Petitioners in their Motion for Reconsideration on the grounds that in *City of Edgerton*, the justice whose impartiality was at issue gave express notice to the lawyers and their clients and invited them to make a challenge prior to her participation in the case. No such invitation was made by Justice Wilcox in *Jackson I*. Moreover, the original plaintiffs in *Jackson I* lacked the facts later uncovered in the Elections Board investigation at the time of the original argument in *Jackson I*. In any

that the motion was "frivolous." The court sanctioned Petitioners because of what it characterized as "inordinate delay" in filing the motion and because it found the Petitioners had filed the motion in bad faith, for improper purpose. The "improper purpose" attributed to Petitioners was inferred from what the court deemed a "tardy" attempt to cast doubt upon the *Jackson I* decision just prior to this Court's consideration of *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002).

By motion dated March 11, 2002, Petitioners sought rehearing of the sanctions order on the grounds, *inter alia*, that the court's decision violated their First Amendment right to petition and their Fourteenth Amendment right to due process of law. The Motion asked the court to withdraw its sanctions order or, in the alternative, remand the case to the circuit court to hear and make findings of fact with respect to the "inference" of bad faith and improper purpose that the court had drawn against Petitioners.

In an order dated July 9, 2002, signed by three justices, with the Chief Justice dissenting and the remaining three justices not participating, the Wisconsin Supreme Court denied the Motion to Reconsider as to Petitioners Edward R. Garvey and the law firm of Garvey & Stoddard, S.C.[2] *See Jackson*, 647 N.W.2d at 816-17 (Wis. 2002) ("*Jackson III*"). Chief Justice Shirley S. Abrahamson issued a strong dissent which criticized both the substance of the sanctions order and

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event, the Chief Justice in her dissent disposed of the court's rationale: "That the petitioners' motion was denied because it was untimely is not the same as a finding that there was no reasonable basis in law or equity to bring the motion." *Jackson*, 2002 WI 90, 647 N.W.2d 815, 819 (Wis. 2000).

[2] The court granted an unopposed motion to modify the sanctions order to remove Warner Jackson, Carl Gobel, Father Thomas Mueller and Wendell Harris.

the procedure followed by the court. *First*, she noted that the court had made no determination on the merits of Petitioners' challenge:

> This court never decided the merits of the challenge in the present case, that is, the court never decided whether Justice Wilcox erred in participating in *Jackson v. Benson.* That the [Petitioners'] motion was denied because it was untimely is not the same as a finding that there was no reasonable basis in law or equity to bring the motion.

Second, she opined that the court's decision lacked any basis for sanctioning Petitioners at all, much less to infer "bad faith" or improper purpose to them:

> Where are this court's findings about the frivolous claim if the court is imposing sanctions under Wis. Stat. § 802.05(1)(a) ? There are none. Where did this court find, as it is required to do, that the attorneys did not make the determinations required under § 802.05(1)(a) that "the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"? The court made no such finding. The court merely concluded that "the only reasonable inference" is that the motion was for "improper purposes."

Wisconsin's Chief Justice concluded as follows:

> In sum, this court's decision declaring the motion frivolous and imposing sanctions is erroneous on its face as a matter of law. *This court has failed to follow the law.* It did not make the requisite findings under either Wis. Stat. § 809.25(3)(c) or § 802.05(1)(a). *This court is not above the law.* Therefore, the court should vacate Part II of its February 19, 2002, decision.

Jackson, 2002 WI 90, 647 N.W.2d at 818-21 (emphases added).

For reasons fully explicated in the Chief Justice's dissent, the Wisconsin Supreme Court's sanctions order violated Petitioners' First Amendment rights to petition as well as their Fourteenth Amendment rights to Due Process of Law.

Most troubling is the context in which the sanctions order was issued. Petitioners were sanctioned for bringing a challenge to the Wisconsin Supreme Court's impartiality in deciding the *Jackson* "school choice" case. The challenge followed admissions of campaign finance law violations by Justice Wilcox's campaign manager and the agent for a group comprised of proponents of a particular outcome in the as-yet undecided *Jackson I* case—as well as a concession of responsibility by Justice Wilcox himself. By sanctioning Petitioners without first addressing whether there was any objective merit to their motion, the court violated Petitioners' First Amendment right to petition and sent a chilling message to anyone considering a future challenge to the court's partiality. It also sent a message to any lawyer who in the future might be asked to consider such a challenge.

In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), this Court recognized the inherent tensions involved when a judge is confronted with an attack on his or her participation in a case. Despite the nature of the attack—and in *Mayberry* there was a particularly egregious set of personal attacks—this Court made clear that particular care must be taken to protect the rights to Due Process of the litigant making the attack. In this context, the Court quoted with approval from the opinion of Chief Justice Taft in *Cooke v. United States*, 267 U.S. 517, 539 (1925) (quoted in part, emphasis added):

> The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. *This rule of caution*

> *is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. . . .*

The Court concluded that "[w]hether the trial be federal or state, the concern is with the fair administration of justice." *Mayberry*, 400 U.S. at 465.

This Court has recently "freed up" state judicial candidates from restraints on campaign speech. *See Republican Party v. White*, 122 S. Ct. 2528 (2002). The separate opinions in the *White* case, however, make clear that the Court did not intend to diminish or qualify the important public interest in maintaining the impartiality in fact as well as the appearance of impartiality of an elected judiciary. This point was emphasized in the concurring opinion of Justice Kennedy:

> Nothing in the Court's opinion should be read to cast doubt on the vital importance of th[e] state interest [in judicial integrity]. Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Id. at 2544 (Kennedy, J., concurring).

This Court's recent decision in *White* underscores the need to avoid chilling petitions which challenge judicial partiality, particularly where, as here, the court is an elected body.[3]

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[3] As ABA President Alfred P. Carlton Jr. recently stated: "The Supreme Court has thrown the fat in the fire[.] . . . If judges indeed have First Amendment rights to fully participate in partisan elections, then they're going to act like partisans. They're going to have to because the system is going to force them." Terry Carter, *Boosting the Bench*, 88 ABA. Oct. 2002, at 34.

Justice O'Connor's concerns, for example, resonate in the context of the facts of this case: "Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary." *Id.* at 2543 (O'Connor, J. concurring). As Justice Kennedy stated, judicial impartiality is a vital "state interest of the highest order." *Id.* at 2544 (Kennedy, J. concurring). Proper public concern about judicial bias (*e.g.*, resulting from campaign "speech" or "announcements" or "pledges" or contributions) would only be exacerbated by a perception that any challenge claiming judicial bias would (or could) be met with sanctions, regardless of its merits.

The vital issue of judicial integrity was the very issue which Petitioners brought directly to the Wisconsin Supreme Court. Theirs was a legitimate and serious challenge. The Wisconsin Supreme Court's summary and punitive rejection of Petitioners' challenge appeared to shun, or at least ignore, a fundamental challenge to the legitimacy of one of its most controversial decisions. In the process, Petitioners' First Amendment right to petition and Fourteenth Amendment right to Due Process were trampled.

STATEMENT OF THE CASE

A. Facts Relating To Petitioners

Petitioners are described as follows: Warner Jackson is an adult resident of Milwaukee whose occupation is a customer service manager; Carl Gobel is an adult resident of Milwaukee who is a retired school administrator; Wendell Harris is an adult resident of Milwaukee whose occupation is an operator of a transit bus service; and Father Thomas Mueller is an adult resident of Milwaukee whose occupation is an Orthodox Priest. These individuals were amongst the group of plaintiffs who challenged the constitutionality of Wisconsin's "Milwaukee Parent Choice" legislation in the *Jackson* case.

Petitioner Edward Garvey has been an attorney in Wisconsin since 1969. During this time, he has been politically active. For example, he was the Democratic Party nominee for the United States Senate in 1986 and for Governor in 1998. He previously served as the Deputy Attorney General for the State of Wisconsin. Petitioner Garvey, together with Glenn Stoddard, founded the law firm of Garvey & Stoddard, S.C. in 1998. Garvey & Stoddard has one office in Madison, Wisconsin with seven attorneys whose practice concentrates in civil rights, environmental and public interest law. Petitioner Garvey has also been active on the issue of campaign finance reform, having created the Heffernan Commission, named after and chaired by former Wisconsin Chief Justice Nathan Heffernan, to examine and find solutions for the corrosive effect which money and special interest groups have had on Wisconsin's elected judiciary and other branches of government.

B. Facts Relating To The Decision To Bring The Motion To Vacate *Jackson v. Benson*, And Its Timing

On March 4, 1998 the Wisconsin Supreme Court upheld the constitutionality of Wisconsin's "Milwaukee Parental Choice Program" or "school choice" program. *See Jackson I*, 218 Wis. 2d 835, 578 N.W.2d 602. Four justices of the court joined in affirming the validity of Wisconsin's program, with one justice not participating and two justices dissenting. Justice Wilcox joined in the majority opinion.

Justice Wilcox's participation in *Jackson I* later served as the reason for Petitioners' Motion to Vacate that decision. Specifically, the Motion to Vacate was based on facts coming out of an investigation of Justice Wilcox's reelection campaign—and admissions relating thereto—which raised serious questions about the propriety of his participation in *Jackson I*.

1. Justice Wilcox's reelection to the Wisconsin Supreme Court: The election eve "get out the vote" campaign and subsequent investigation thereof by the Wisconsin Elections Board

In April 1997, Justice Wilcox defeated attorney Walter Kelley in a statewide election to retain his seat on the Wisconsin Supreme Court. *Jackson II*, 249 Wis. 2d at 687, 639 N.W.2d at 548. Subsequent to that election, questions arose concerning the identity of persons and entities who funded an election-eve "get out the vote" mailing of some 345,000 postcards and an intensive last-minute telephone campaign costing approximately $200,000 (without regard to the value of "in kind" time) in support of Justice Wilcox's reelection. Compl. ¶ 11 (App. 60a-61a). On June 16, 1997, the Wisconsin Coalition for Voter Participation ("WCVP") was identified in a newspaper article as the group that coordinated the postcard mailing. On July 30, 1997, the Wisconsin Elections Board commenced an investigation to determine, *inter alia*, who had contributed the funds that the WCVP used in coordinating the last-minute campaign and whether or not the Wilcox campaign itself was directly or indirectly involved. *Jackson II* at 688, 639 N.W.2d at 548.

"School choice" was one of the important issues in the Wilcox-Kelly race for the Supreme Court. Prior to the election, a Dane County Circuit Court judge had declared that Milwaukee's "school choice" program was unconstitutional and, in light of the Wisconsin Supreme Court's three-to-three decision in the prior "school choice" case,[4] the trial court's decision was likely to ultimately find its way to the Wisconsin Supreme Court after the election. And so it did.

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[4] Wisconsin's "school choice" program had previously come before the Wisconsin Supreme Court in 1996. The court split three-to-three over the constitutionality of the program, with Justice Wilcox voting to uphold it. *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 546 N.W.2d 140 (Wis. 1996).

On August 22, 1997, the Wisconsin Court of Appeals affirmed the lower court order finding that Wisconsin's "school choice" program was unconstitutional. *Id.* The Wisconsin Supreme Court then granted the state's petition for review in October 1997.

In December 1997, the Elections Board commenced an administrative investigation of the WCVP, the Justice Wilcox for Justice Campaign ("JWJC") and its campaign manager, Mark Block, and others, for possible violations of Wisconsin elections law. The complaint alleged, *inter alia*, that the JWJC had received indirect campaign contributions from individuals and entities in violation of Wis. Stat. §§ 11.38(1)(a)1 and (b).[5] *See* Compl. ¶ 14 (App. 61a).

2. The stay of the Elections Board's investigation: December, 1997 through November, 1999

The Elections Board was unable to complete its investigation prior to oral argument in *Jackson I*, however, because in December 1997 the WCVP, together with the JWJC and Mark Block, filed a lawsuit seeking to halt the investigation. *Jackson II*, 249 Wis. 2d at 688-89, 639 N.W.2d at 548. Although this lawsuit was dismissed on summary judgment, the Wisconsin Court of Appeals granted a stay of the investigation pending appeal of the dismissal. *WCVP v. Wis. Elections Bd.*, 231 Wis. 2d 670, 673, 605 N.W.2d 654, 656-57 (Ct. App. 1999). Thus, despite having been dismissed at the trial court level, the lawsuit effectively suspended the investigation during the entire time that the Wisconsin Supreme Court was considering *Jackson I*.

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[5] Section 11.38(1)(a)1 of the Wisconsin Statutes precludes any "foreign or domestic corporation or association" from making "any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum." Section 11.38(1)(b) precludes any candidate from accepting any such contributions.

3. Oral argument in *Jackson* I: March 4, 1998

The Wisconsin Supreme Court heard oral argument in *Jackson I* on March 4, 1998, and issued its decision on June 10, 1998. The decision was four-to-two in favor of the constitutionality of the school choice program. Justice Wilcox participated and voted with the majority. On November 9, 1998, this Court denied certiorari review (*sub nom. Gilbert v. Moore*, 525 U.S. 997 (1998)).

4. The outcome of the Elections Board's civil case: Mark Block's admissions and Justice Wilcox's March, 2001 "concession"

In November 1999, the Wisconsin Court of Appeals allowed the Elections Board investigation to proceed by affirming a circuit court dismissal of the WCVP's lawsuit. *Wis. Elections Bd.*, 231 Wis. 2d at 687, 605 N.W.2d at 662. Thereafter, the investigation continued. However, on March 22, 2000, the Elections Board unanimously adopted the following motion, which appeared to vindicate Justice Wilcox:

> Motion: To express the sense of the elections board that Jon Wilcox did nothing illegal and was not personally responsible for any illegal activities of his campaign for the office of Justice of the Supreme Court . . . .

Jackson II, 249 Wis. 2d at 689, 639 N.W.2d at 549. Notwithstanding, on March 24, 2000, the Elections Board filed a civil lawsuit against Mark Block, the WCVP, the JWJC (and others), alleging various violations of state election laws. The Elections Board's complaint alleged, in part, as follows:

> 11. Prior to the April 1, 1997 Wisconsin Supreme Court Election, in furtherance of their GOTV ["get out the vote"] project, . . . the WCVP made disbursements and incurred obligations of approximately $200,000 on mailings and telephone calls to targeted voters. This GOTV effort included mailing approximately 345,000

postcards on or about March 27, 1997, and making approximately 250,000 telephone calls to postcard recipients or other targeted voters between March 27 and April 1, 1997. WCVP raised $200,500 from 12 contributors to the GOTV effort.

12. The purpose of WCVP's GOTV effort was to influence the election of Wisconsin Supreme Court Justice on April 1, 1997, by supporting the election of Justice Wilcox, and as such the postcard mailings and telephone calls referred to in the preceding paragraph constituted "contributions" within the meaning of Wis. Stat. § 11.01(6)(a).

Compl. ¶¶ 11-12 (App. 60a-61a).

The names of the contributors who had given to the WCVP were not identified in the complaint. Contemporary newspaper articles leaked names of contributors "based on knowledgeable sources." Cary Segall & Andy Hall, *Big, Out of State Donors Weighed In For Court Case*, Wis. St. J., Mar. 19, 2000 (cited in *Jackson II*, 249 Wis. 2d at 690 n.6, 639 N.W.2d at 549 n.6). An April 20, 2000 newspaper article identified the contributors after bank records for WCVP were unsealed, but at this time, election law violations had not yet been proven. Cary Segall & Andy Hall, *Wilcox Backers Revealed, GOP School Choice Supporters Funded Secret Effort*, Wis. St. J., Apr. 20, 2000 (cited in *Jackson II*, 249 Wis. 2d at 690 n.6, 639 N.W.2d at 549 n.6).[6]

It was not until March 20, 2001 that the Elections Board civil action ended with a monetary settlement and a stip-

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[6] In its decision on sanctions, the majority, citing these newspaper accounts, seemed to suggest that this information should have triggered the motion. *Jackson II*, 249 Wis. 2d at 695, 639 N.W.2d at 551. Petitioner Garvey's later-submitted affidavit explained why they did not. "[R]egardless of what the press was saying . . . it was my opinion that until [the] investigation was completed and the results were known . . . it was not appropriate (or prudent) for any party to approach the Court to ask for relief . . . ." Garvey Aff. ¶ 7 (App. 51a).

ulation and order for dismissal. As part of the settlement, Justice Wilcox's campaign manager, Mark Block, agreed to pay $15,000 and admitted that "I and others violated state campaign finance laws in connection with the spring 1997 election of Justice Jon Wilcox to the Wisconsin Supreme Court . . . . *I recognize that my conduct has undermined public confidence in the integrity of the state electoral process.*" March 2001 Statement of Mark J. Block (emphasis added, attached to Milligan Aff.) (App. 34a). In a statement filed with the stipulation, Justice Wilcox acknowledged his responsibility for the activities of his campaign staff, and chose not to contest the Elections Board's suit:

> Last March [2000] the State Elections Board stated that it was the sense of the Board that I did nothing illegal and was not personally responsible for any illegal activities of my campaign. However, the Board's investigation has implicated my campaign manager and others in violations of the state's campaign finance law. I choose not to contest this. I acknowledge that I had a responsibility for the conduct of campaign staff. Therefore, as the candidate, I am funding my campaign committee [in the amount of $10,000] so that the committee can pay a monetary penalty to settle this matter.

March 2001 Statement of Jon P. Wilcox (attached to Milligan Aff.) (App. 40a).

C. The Motion To Vacate *Jackson I*

Based on Petitioner Garvey's review of the documents relating to the settlement of the Elections Board lawsuit (which had not become available to Petitioners until the middle of April 2001), and particularly the acknowledgment of Justice Wilcox in combination with the admissions of his campaign manager, on January 8, 2002, Petitioners filed a Motion to Vacate *Jackson I* and to rehear the case on the grounds that Justice Wilcox should not have participated in

the decision, *inter alia*, because of an "appearance of impropriety."[7] Petitioners' Motion to Vacate at 27. The motion stated that it was based on "new information recently received" which had "revealed that the decision was rendered by an improperly constituted panel because of the participation of [Justice Wilcox]." Petitioners' Motion to Vacate at 1.

Although *Jackson I* was decided 4-2 in favor of upholding the constitutionality of Wisconsin's "school choice" program, Wisconsin law is well-established that if a decision was rendered by a panel which included a justice who should have been disqualified, that decision is void whether or not there would have been sufficient votes to sustain the decision without that justice's participation. *State v. Am. TV & Appliance of Madison, Inc.*, 151 Wis. 2d 175, 179, 443 N.W.2d 662, 663 (1989).

The State of Wisconsin, represented by private counsel, opposed the motion and in its brief requested sanctions in the form of attorney's fees and costs. The State did not file a separate motion for sanctions: its opposition brief was entitled "Memorandum in Opposition to Motion to Vacate and Motion for Attorney Fees and Costs Pursuant to Wis. Stat. § 809.25(3)" and contained a one and a half page section arguing for attorney's fees. *See* January 23, 2002 Memorandum in Opposition to Motion to Vacate and Motion for Attorney Fees and Costs Pursuant to Wis. Stat. § 809.25(3) at 32-33.

Upon receiving the State's opposition memorandum, and because there was no separate notice and motion accompanying the State's request for sanctions, Petitioners contacted the clerk of the Wisconsin Supreme Court to ascertain

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[7] There is no statute of limitations in Wisconsin for bringing a motion to vacate a decision on grounds of judicial bias. *See generally* Wis. Stat. Sec. 806.07(2) (1999-2000).

the deadline for replying.[8] The clerk informed Petitioners that they would not have an opportunity to reply. The clerk stated that, if the court wanted a reply, it would inform Petitioners and provide a deadline. *See* Milligan Aff., ¶¶ 5-6 (also submitted with Petitioners' Motion for Reconsideration) (App. 28a). However, the court did not provide Petitioners with any such opportunity to respond, and thus no response to the State's request for sanctions was made prior to the Court's February 19, 2002 order granting sanctions.[9]

D. The Wisconsin Supreme Court's Denial Of The Motion To Vacate And Grant Of Sanctions Against Petitioners

On February 19, 2002, the Wisconsin Supreme Court denied the Motion to Vacate (in part I) and granted sanctions against all Petitioners (in part II). The court did not address the underlying merits of the motion, but rather based its denial *solely* on its "tardiness." It further held that the motion was "frivolous," reasoning as follows: "[Petitioners'] inordinate and *unexplained*[10] delay in raising the disqualification

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[8] Federal Rule of Appellate Procedure 38 was promulgated to avoid this very kind of uncertainty. *See* note 16, *infra*.

[9] Petitioners did file a two-page "supplementation" to their motion on February 4, 2002. This supplemental filing, however, by its terms and content, was not a "response" to the State's request for sanctions (as the State contended in its reply to the Motion for Reconsideration), nor was it intended to be. Instead, it presented new information which had become known to Petitioners after they had filed their motion.

[10] Petitioner Garvey later *explained* the timing of the Motion to Vacate in his March 11, 2002 affidavit in support of Petitioners' Motion for Reconsideration:

> Regardless of what I may have suspected prior to my review of these settlement documents—indeed regardless of what the press was saying—as I knew that there was in fact an ongoing investigation, it was my opinion that until that investigation was completed and the results were known—particularly as I knew that

issue in a timely fashion constitutes a waiver of whatever objections they may have had in this regard and lead us to the conclusion that the motion to vacate is frivolous." *Jackson II*, 249 Wis. 2d at 686-87, 639 N.W.2d at 547-48 (emphasis added). In part II of its decision, the court found that the motion was filed in bad faith and for an improper purpose, reasoning as follows:

> We conclude that the motion to vacate, coming as it did almost two years after the public disclosure of the information pertinent to the [Petitioners'] claims and shortly before oral argument in the United States Supreme Court [in the *Zelman* case], was filed in bad faith, for improper purpose, to undermine the public's confidence in the legitimacy of this court's decision and the integrity of this court as an institution.

Id. at 697, 639 N.W.2d at 552-53. The court added that Petitioners' "inordinate delay in filing the motion mocks the fundamental and vital principle of finality, which is essential to the operation of a society governed by law." *Id.* at 695, 639 N.W.2d at 551.

The court remanded the case to the circuit court for "a determination of the amount of reasonable attorney fees and costs." *Id.* at 697, 639 N.W.2d at 553. The order granting sanctions did not permit Petitioners any opportunity to

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> Justice Wilcox himself had participated in the investigation—it was not appropriate (or prudent) for any party to approach the Court to ask for relief resulting from Justice Wilcox's participation in the *Jackson* case. Justice Wilcox, after all, was entitled to his day in court.

Garvey Aff. ¶ 7 (App. 51a). Petitioner Garvey's explanation was not considered by the Wisconsin Supreme Court. It made no findings of fact relating to his explanation, or any of the other facts attested to in the Garvey Affidavit or other submissions filed with the Motion for Reconsideration, and there was no hearing to determine the weight or relevance of such facts.

respond to its "findings," nor did it direct the circuit court to conduct a fact-finding hearing to determine whether such "findings" had any factual basis. *Id.*

The Chief Justice dissented from the sanctions order, without opinion other than to state "[t]his proceeding ought to end now." *Id.* at 697-98, 639 N.W.2d at 553.

On the basis of the majority decision, the Wisconsin Supreme Court's disciplinary board (the Office of Lawyer Regulation) commenced a disciplinary investigation of the lawyer Petitioners.

E. The Motion For Reconsideration, The Wisconsin Supreme Court's Denial Of That Motion, And The Chief Justice's Dissent

On March 11, 2002, Petitioners filed a Motion to Reconsider the court's sanctions order on the grounds, *inter alia*, that by sanctioning them based on the inference that the Motion to Vacate was brought "in bad faith for improper purpose" the court had violated their Fourteenth Amendment rights to procedural due process and their First Amendment rights to petition the court for a redress of grievances. In the alternative, Petitioners requested that the court remand the case to the trial court so that they could be heard and present evidence to explain their "tardiness" and refute the inference that the Motion to Vacate was brought "in bad faith for improper purpose." Accompanying the Motion for Reconsideration were extensive, responsive, sworn factual proffers from Petitioners, including an Affidavit from Petitioner Edward Garvey, which directly responded to the court's holdings concerning the merits and timing of the Motion to Vacate and directly joined issue with the court's "findings" as to Petitioners' purpose, motivation and intent. (App. 69a-79a).

On July 9, 2002, the Wisconsin Supreme Court denied the Motion for Reconsideration in a six-paragraph order. *Jack-*

son III, 647 N.W.2d at 816-17. What was once a four-justice majority was now three, as an additional justice had decided not to further participate. The order denying the motion did not address any of the factual showings proffered in support of the motion. Rather, it summarily denied the motion and remanded the case for the limited purpose of determining reasonable attorneys fees. *Id.* at 816-17. The questions raised in the Motion to Reconsider were begged: "We have searched for any case involving a finding of frivolousness in which attorney fees and costs were not awarded. We have found none." *Id.* at 817. The majority did not respond to Petitioners' First or Fourteenth Amendment challenges to the sanctions order.

Wisconsin's Chief Justice did respond, however. Ironically, she stated that the court's own "declaration of frivolousness and the imposition of sanctions in this case undermines confidence in the legitimacy of this court's decision-making process and the integrity of this court as an institution." *Id.* at 818. Of particular concern to her was the fact that the majority failed "to make findings or present any reasoning or justification for its finding of frivolousness or the imposition of sanctions." *Id.* The Chief Justice expressly noted the lack of due process afforded to Petitioners:

> And should not the parties have been given an opportunity to present arguments on the legal question of the applicability of [the statute authorizing sanctions] and to be accorded a hearing and present testimony and argument on the factual bases for the imposition of sanctions under [that statute]? The answer to these questions is clearly yes. But the court failed to take any such action.

Id. at 820. And she criticized the majority's "timing inference" (*i.e.*, the inference drawn from the temporal

relationship between the Motion to Vacate and the prospective argument in *Zelman*) *as a matter of law*:

> Is the timing of these events coincidental? Does it matter? Lawyers frequently attempt to undermine cases that are not in their favor. They ask courts to distinguish, limit, vacate, or overrule prior cases. And this court has distinguished, limited, vacated, or overruled cases or has refused to do so. That is the common law process.[11]

Id. at 821.

The Chief Justice also expressly recognized the inextricable interrelationship between Petitioners' First Amendment right to petition and a determination that the petition was "frivolous":

> [A] determination of frivolousness is "an especially delicate area; a court must be cautious in declaring an action frivolous." This court must give the public wide berth to exercise its constitutional right "to petition the government for the redress of grievances."

Id. at 821. Wisconsin's Chief Justice concluded with a statement that rings particularly true following this Court's *White* decision:

> Anyone challenging a decision of this court, the impartiality of a justice, or the integrity of this institution must receive a full, fair, and impartial hearing, without even a hint of recrimination, retribution, or retaliation.

Id. at 822.

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[11] The Wisconsin Supreme Court's decision sanctioning Petitioners did not issue until July 9, 2002, after this Court's 5-4 decision in *Zelman*. Had *Zelman* gone the other way, of course, the *Jackson* case would have been rendered "non-final" as a matter of law. In any event, the court's reliance on the "fundamental and vital principle of finality" was, at best, problematic in the context of this case, ironically *because Zelman* was pending.

REASONS FOR GRANTING THE PETITION

Certiorari is appropriate in this case for two independent but interrelated reasons:

1) To restore to Petitioners their full rights to petition.

Because of the vital public interest in preserving the public perception of the integrity of the judicial system, an elected court faced with a legitimate, or even colorable, challenge to the integrity of one of its decisions should take pains to address and fairly resolve the merits of that challenge. *See* Supreme Court's Rule 10(c). In this case, the Wisconsin Supreme Court did not even attempt a reasoned rejection of Petitioners' challenge. Instead, Petitioners were sanctioned based on a legally questionable—and, had they been given the opportunity to be heard, rebuttable—"inference."

In order to preserve the public's continued confidence in an impartial judiciary and to restore Petitioners' right to petition, this Court should grant certiorari and hold that a court may not sanction a party petitioning a court on a claim of judicial partiality without first finding that the petition was objectively meritless.

2) To afford Petitioners Edward R. Garvey and the law firm of Garvey & Stoddard, S.C., their full rights to Due Process of Law.

The Wisconsin Supreme Court's sanctions order is contrary to the decisions of virtually every federal circuit court which has addressed the question of sanctions. *See* Supreme Court Rule 10(b) and (c). Courts addressing the sanctioning of an attorney have almost universally demanded that any party or lawyer potentially subject to sanctions be granted certain procedural due process protections. The sanctions order in this case denied Petitioners Due Process of Law.

In order to afford Petitioners' right to Due Process of Law, this Court should grant certiorari and hold that a

court may not sanction a litigant or his or her attorney on grounds related to their purposes, motives or intents without first affording them the right to be heard on those charges in front of an impartial tribunal.

ARGUMENT

I. THE FIRST AMENDMENT RIGHT TO PETITION SHOULD BE CONSTRUED TO GUARANTEE THAT A PARTY ASSERTING A COLORABLE CLAIM OF JUDICIAL DISQUALIFICATION CANNOT BE SANCTIONED UNLESS THAT CLAIM IS FIRST FOUND TO BE OBJECTIVELY MERITLESS.

A. In Certain Contexts, This Court Has Held Previously That Limitations May Not Be Placed On Access To Courts Merely Because Of The Subjective Motivations Of The Petitioning Party.

The First Amendment right to petition is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (2002). This right protects access to the courts, as well as the legislature. *Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1972). This Court has previously recognized that this right cannot be subject to the threat of liability under certain federal statues (antitrust and labor) absent an initial determination that the petition was objectively baseless, or a "sham." [12] *See, e.g., E. R.R. Presidents Conference v. Noerr*

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[12] The Federal Circuit Courts of Appeal are split as to whether a court may sanction a party, *e.g.* under Fed. Rule Civ. P. 11, for bad faith regardless of the merits of the party's claim. *See* Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 Ohio St. L.J. 665, 711-17 (2000) (discussing circuit court cases). Petitioners do not address those cases in this petition because it is the contention of Petitioners that, given the *kind* of petition they brought, constitutional principles under the First and Fourteenth Amendments qualify, if not

Motor Freight, Inc., 365 U.S. 127 (1961); *Prof'l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983). Under this line of authority, unless and until a petition is found to be "sham," the subjective motivations of the party are irrelevant.

In *Professional Real Estate Investors*, the Court set out a methodology to be used to balance the need to deter frivolous, or "sham," lawsuits against the need to preserve the right to petition:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. *Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.*

508 U.S. at 60 (emphasis added). By mandating a determination of the merits of a case *before* any analysis of the subjective motivations of a party, this Court has assured that *only* those lawsuits which cannot be deemed to be a proper exercise of the right to petition, *i.e.*, objectively meritless suits, are subject to the deterrent effect of sanctions (*e.g.*, in the form of antitrust liability or a claim of unfair labor practices).[13] Indeed, the Court has suggested that even *losing*

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outright trump, rules of ethics or civil procedure except insofar as those rules may help to define concepts of "frivolousness" or "bad motive."

[13] This Court has not addressed whether the protections manifest in the *Professional Real Estate Investors* methodology must be applied to a court's decision of whether to sanction a party for filing an allegedly frivolous lawsuit. Petitioners are not seeking to apply the broader protections of *Professional Real Estate Investors* to all cases. Instead, this petition only requests that the Court apply those protections to claims of

lawsuits should not be subject to such deterrence without a finding of objective meritlessness. "[T]he genuineness of a grievance does not turn on whether it succeeds." *BE & K Constr. Co.*, 122 S. Ct. at 2399.[14]

This Court should grant certiorari to confirm that Wisconsin's Chief Justice was right: this same analysis should apply where, as here, the petitioning party has brought a colorable challenge to judicial impartiality of a particular justice in a given case.

B. The Public Interest In An Impartial Judiciary Deserves Even Greater Protection Than The Private Interests Protected By Existing Authority.

In *Noerr* and its progeny, the petitioning parties were seeking judicial intervention to protect their commercial or competitive status.[15] In those decisions, the Court recognized that, even though the petitioners obviously had a self-interest in protecting their commercial and competitive status, the existence of such interests should not undermine their constitutional right to petition. Indeed, the Court held that a desire to obtain personal advantage was likely present in *any* petition to the government and it would be improper to "deprive the people of their right to petition in the very

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judicial disqualification, where there is a uniquely important public interest.

[14] Petitioners do not here, nor did they in the Motion For Reconsideration, request a rehearing of the denial of their Motion To Vacate. That, of course, is a far different question than the question of whether the Motion To Vacate was frivolous.

[15] For example, in *Noerr*, a trucking company was seeking judicial intervention to preclude a competitor (the railroads) from passing certain legislation detrimental to them. 365 U.S. at 129-30. Similarly, in *Professional Real Estate Investors*, movie studios had petitioned the court to preclude a hotel chain from copyright infringement. 508 U.S. at 52-53.

instances in which that right may be of the most importance to them." *Noerr*, 365 U.S. at 139.

If the protection afforded by the "objectively meritless" standard is appropriate where the party's interest is "private," *a fortiori*, it protects a party challenging the partiality of a court in rendering against it in a decision of vital public importance. Such a party not only has its own "private" constitutional right to due process to assert, it also inherently asserts the public's right to, and interest in, such an impartial decisionmaker. Here, in particular, the public has a strong interest in fostering meritorious petitions. *Cf. Noerr*, 365 U.S. at 139 (identifying the importance of "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws").

Certiorari is appropriate in this case to assure that the right to petition a court on a claim of judicial partiality is granted at least the same protections provided to parties seeking to petition a court to preserve or protect their wholly private interests.

C. The Wisconsin Supreme Court's Sanctions Order Was An Unconstitutional Infringement On Petitioners' First Amendment Right To Petition And Has Also Sent the Wrong Message to the Citizens of Wisconsin.

By sanctioning Petitioners without conducting any objective analysis of the merits of their Motion to Vacate, the Wisconsin Supreme Court has "sent the message" that it may well wield the heavy sword of sanctions against both the lawyer and his client *regardless* of the merits of any challenge to judicial partiality. Wisconsin's Chief Justice recognized that this was the *wrong* message in her powerful dissent:

> If we are to protect the integrity of the judiciary, this court must ensure that it remains an institution that is

> open and accessible. It must not succumb to the temptation to silence challengers by attacking them personally or by diverting attention away from the merits of a challenge. Anyone challenging a decision of this court, the impartiality of a justice, or the integrity of this institution must receive a full, fair, and impartial hearing, without even a hint of recrimination, retribution, or retaliation. *That is the message the court should be sending.*

Jackson III, 647 N.W.2d at 822 (emphasis added). Of particular concern to her was the effect of that "message" on the public:

> The court must be big enough in stature, strong enough in spirit, and gracious enough in action to respond fairly and fully on the merits to any challenge to its integrity, and then without vengeance or even the appearance of vengeance move on to our other business. The people of this state deserve no less.

Id.

As a logical and necessary extension of its prior decisions concerning a party's First Amendment right to petition the government, this Court should grant certiorari in order to confirm that a court cannot sanction a party asserting a claim of judicial partiality unless and until the court first determines that the action is objectively meritless.

II. THE WISCONSIN SUPREME COURT'S SANCTIONS ORDER VIOLATED PETITIONER EDWARD R. GARVEY AND PETITIONER GARVEY & STODDARD, S.C.'S RIGHT TO DUE PROCESS.

A. This Court Has Found That An Attorney Must Be Afforded Procedural Due Process Prior To The Imposition Of Sanctions.

This Court has held that sanctions must not be imposed without a prior opportunity to be heard. *Roadway Express,*

Inc. v. Piper, 447 U.S. 752, 767 (1980). Specifically, this Court has stated that, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.* at 764. Although this Court has recognized a court's inherent powers to sanction an attorney for misconduct, it has acknowledged that such powers should not be carelessly wielded. *Id.* ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.") (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("A court must, of course, exercise caution in invoking its inherent power, and *it must comply with the mandates of due process*, both in determining that the requisite bad faith exists and in assessing fees.") (emphasis added).

B. The Federal Circuit Courts Of Appeal Uniformly Require That An Attorney Be Afforded Procedural Due Process Prior To The Imposition Of Sanctions Based On Allegations Of Bad Faith Or Improper Purpose.

The Wisconsin Supreme Court's order is in direct conflict with the decisions of federal courts of appeal on the issue of whether a court is required to afford an attorney procedural due process before imposing sanctions based on charges of bad faith or improper purpose.

The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Federal Circuits have all held that an attorney is entitled to an opportunity to be heard before a court may impose sanctions based on such charges. *See e.g., Mickle v. Morin*, 297 F.3d 114 (2d Cir. 2002); *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175 (3d Cir. 2002); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281 (5th Cir. 1991); *Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc.*, 858 F.2d 317 (6th Cir. 1988); *United*

States v. 1948 S. Martin Luther King Drive, 270 F.3d 1102 (7th Cir. 2001); *In re Clark*, 223 F.3d 859 (8th Cir. 2000); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1982); *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987); *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306 (11th Cir. 2002); *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 899 F.2d 1171 (Fed. Cir. 1990).

Those cases which have permitted appellate sanctions without providing an opportunity to be heard have not depended upon the inherently factual issues of motive, purpose, and intent. For example, in *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987), the Seventh Circuit found that notice and a hearing were *not* required under Fed. R. App. P. 38, as the attorney's mental state was not at issue and there were no factual issues to resolve. *Id* at 1201-02. In *Romala Corp. v. United States*, 927 F.2d 1219 (Fed. Cir. 1991), the Federal Circuit also found that a party was not entitled to specific notice and an opportunity to explain its actions under Rule 38, as "no possible explanation could justify" misstatements in that party's briefs. *Id.* at 1226-27.

Here, Petitioners' motives and intent were not merely *an* issue supporting the court's finding of frivolousness, they were the *sole* basis for that finding. Further, as shown in the affidavits submitted by Petitioners in support of their Motion for Reconsideration, the inference of bad faith and improper purpose which the court drew against Petitioners was directly rebutted. *See supra* note 10. At a minimum, Petitioners were entitled to a fair hearing on their proffers.[16]

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[16] To protect against the possibility of an arbitrary imposition of sanctions, Rule of Appellate Procedure 38 was amended to expressly require that an appeal not be deemed frivolous absent "a separately filed motion or notice from the court *and* reasonable opportunity to respond" (emphasis added). The rule further requires that, regardless of whether or not the notice was adequate, *it is up to the court* to provide the opportunity

The need for procedural due process protections at the appellate level are heightened because of the nature of appellate review and because often the appellate court issuing the sanctions is the court of last resort. As the Chief Justice of the Wisconsin Supreme Court stated in her dissent: "Keeping this court open to people who are challenging a decision of this court on the basis of a justice's alleged bias is especially critical, *because this court is the only venue where a party can make this kind of challenge*." *Jackson III*, 647 N.W.2d at 822 (emphasis added).

Due Process of Law was denied Petitioners. As a consequence, their reputations have been sullied and they have been ordered to pay substantial attorney's fees. They are being investigated for ethical violations. They seek relief from this Court. They have no other recourse.[17]

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to be heard. As the Advisory Committee Notes to this Rule explain (emphasis added):

> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express* . . . that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. . . . *Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court.*

Here, of course, the state's "motion" (and brief) was precisely the type of inadequate notice that this amendment was directed at.

[17] Only this Court has authority to review a state court decision that is "judicial" in nature. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Although this Court has not formally resolved the question, the federal circuit courts have repeatedly held that a decision disciplining a party is "judicial." *See, e.g., Patmon v. Mich. Supreme Court*, 224 F.3d 504 (6th Cir. 2000) (precluding challenge against attorney discipline

CONCLUSION

It is difficult enough for a lawyer to bring a motion attacking the impartiality of a sitting justice in a high profile case. Some lawyers—for obvious business reasons—simply will not bring such a motion regardless of its merit. And if the sanctions order in this case is permitted to stand on this record, there will likely be fewer lawyers in Wisconsin willing to take such a risk. This Court, of course—like the Wisconsin court—does not want to encourage meritless disqualification motions. Such motions are not "in the public interest," nor do Petitioners contend that they are. But lawyers, too, have a vital role to play in the administration of justice, and it *is* in the public interest to permit them to perform that role. The System has no other means available.

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process based upon due process grounds); *Levin v. Attorney Registration & Disciplinary Comm'n of the Supreme Court of Ill.*, 74 F.3d 763 (7th Cir. 1996) (same).

This Court should grant certiorari in order to strike the required constitutional balance between the important and "delicate" interests at stake in this case and others to follow.

Respectfully submitted,

Of Counsel:

ROBERT W. KASTENMEIER
2800 North 27th Street
Arlington, VA 22207
(703) 525-7484

MICHAEL J. REMINGTON
DRINKER, BIDDLE & REATH LLP
1500 K Street NW, Suite 1100
Washington, DC 22205-1209
(202) 842-8839

JOHN S. SKILTON *
CHRISTOPHER G. HANEWICZ
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703-5118
(608) 663-7460

MARK A. FRANKEL
LAFOLLETTE GODFREY & KAHN
One East Main Street, Suite 500
Madison, WI 53701-2719
(608) 257-3911

Counsel for Petitioners

October 7, 2002

* Counsel of Record

APPENDIX A

SUPREME COURT OF WISCONSIN

Case No.: 97-0270

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et al.*,
Respondents.

JUDGES: JON P. WILCOX, ANN WALSH BRADLEY, and DIANE S. SYKES, *JJ.*, did not participate. SHIRLEY S. ABRAHAMSON, *Chief Justice* (dissenting).

OPINION

MOTIONS for reconsideration and modification.

PER CURIAM. Respondents, Carl Gobel, Warner Jackson, Father Thomas Mueller, and Wendell Harris, and Attorney Ed Garvey and the law firm of Garvey, Stoddard, S.C. move the court for reconsideration of Part II of its opinion in *Jackson v. Benson*, 2002 WI 14, 249 Wis. 2d 681, 639 N.W.2d 545,[1] finding the motion to vacate the court's 1998 decision in the case to be frivolous and remanding the matter to the Dane County Circuit Court for a determination of the amount of reasonable attorney fees and costs.

Respondents Gobel, Jackson, Mueller and Harris have also filed a separate motion to modify the sanctions order to remove them from the obligation to pay any sanctions which

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[1] A copy of the February 19, 2002 opinion is attached to this decision as Appendix B.

might ultimately be imposed. The State of Wisconsin has expressly indicated it does not oppose a modification of the sanctions order to exclude the individual respondents from any obligation to pay sanctions, and no party has objected to such a modification.

The motion to modify the sanctions order to remove respondents Gobel, Jackson, Mueller and Harris from any obligation to pay sanctions is granted.

The motion for reconsideration of Part II of this court's opinion, which found the motion to vacate frivolous and remanded the matter to the Dane County Circuit Court for a determination of the amount of reasonable attorney fees and costs, is denied without costs.

The dissent deserves some response. We all agree, including the dissenting justice, that "the respondent's inordinate delay in filing the motion to vacate mocks the fundamental and vital principle of finality, which is essential to the operation of a society governed by law." *Jackson v. Benson*, 2002 WI 14, P22, 249 Wis. 2d 681, 639 N.W.2d 545. (Emphasis added.) Accordingly, four of the five members sitting on this case found the respondent's motion frivolous and awarded fees, costs, and attorney fees.

Both Wis. Stat. § 809.25(3)(a) and § 814.025(1) are mandatory. See § 809.25(3)(a) ("If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section."); § 814.025 ("If an action . . . is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees."); *see also Jandrt v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 576, 597 N.W.2d 744 (1999); *Sommer v. Carr*, 95 Wis. 2d 651, 653-54, 291 N.W.2d 301 (Ct. App. 1980), *rev'd on other grounds*, 99 Wis. 2d 789, 299 N.W.2d 856

(1981). Every single reported case in the last 20 years involving a finding of frivolousness has resulted in the award of attorney fees and costs. We have searched for any case involving a finding of frivolousness in which attorney fees and costs were not awarded. We have found none. *See, e.g., Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 840-42, 501 N.W.2d 1 (1993); *Elmakias v. Wayda*, 228 Wis. 2d 312, 318-23, 596 N.W.2d 869 (Ct. App. 1999); *Chase Lumber & Fuel Co., Inc. v. Chase*, 228 Wis. 2d 179, 206-10, 596 N.W.2d 840 (Ct. App. 1999); *Gardner v. Gardner*, 190 Wis. 2d 217, 248-51, 527 N.W.2d 701 (Ct. App. 1994); *Schapiro v. Sec. Sav. & Loan*, 149 Wis. 2d 176, 187-89, 441 N.W.2d 241 (Ct. App. 1989); *Tracy v. DOR*, 133 Wis. 2d 151, 162-63, 394 N.W.2d 756 (Ct. App. 1986); *Wengerd v. Rinehart*, 114 Wis. 2d 575, 580-84, 338 N.W.2d 861 (Ct. App. 1983).

JON P. WILCOX, ANN WALSH BRADLEY, and DIANE S. SYKES, JJ., did not participate.

DISSENT: SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE *(dissenting)*. I joined Part I of the court's decision of February 19, 2002, denying the petitioners' [2] motion to vacate this court's decision in *Jackson v. Benson*.[3] Jackson upheld the constitutionality of the "school voucher" law. The petitioners do not challenge this part of the decision.

I dissented from Part II of the February 19, 2002, decision. That decision sanctioned the petitioners for bringing the motion to vacate, which the court declared frivolous. The petitioners seek reconsideration of Part II of the decision. The majority denies reconsideration.

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[2] Carl Gobel, Warner Jackson, Father Thomas Mueller, Wendell Harris, Attorney Ed Garvey, and the law firm of Garvey & Stoddard, S.C., are the petitioners requesting the court to reconsider and withdraw Part II of its February 19, 2002, decision.

[3] *Jackson v. Benson*, 2002 WI 14, 249 Wis. 2d 681, 639 N.W.2d 545.

I continue to maintain that the court has erred in declaring the petitioners' motion frivolous and in imposing sanctions on the petitioners in this case.[4] I have two reasons for dissenting here:

First, the court's decision declaring the petitioners' motion frivolous and imposing sanctions is erroneous on its face as a matter of law. The court has failed to justify the declaration of frivolousness and the imposition of sanctions as required by either *Wis. Stat.* § 809.25(3)(c) or § 802.05(1)(a).

Second, the declaration of frivolousness and the imposition of sanctions in this case undermines confidence in the legitimacy of this court's decision-making process and the integrity of this court as an institution.

I

Statutes, rules, and case law govern the finding of frivolousness and the imposition of sanctions. This court did not adhere to the applicable law in the present case.

The court addressed the issue of frivolousness and sanctions in the final two paragraphs of its decision. I have appended the entire two-paragraph opinion on frivolousness and sanctions to this dissent so readers can easily judge for themselves the court's failure to make findings or present any reasoning or justification for its finding of frivolousness or the imposition of sanctions (*see* Appendix A).

In its finding of frivolousness and in its imposition of sanctions, the court relies on *Wis. Stat.* § 809.25(3)(c), as the State's private counsel urged.[5] As a condition to imposing

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[4] The court relieves the individual petitioners from the sanctions, not because the court concludes it erred, but because of the parties' agreement.

[5] The entire argument of the State's private counsel appears in the Memorandum in Opposition to Motion to Vacate and Motion for Attorney Fees and Costs Pursuant to Wis. 2d 809.25(3) at 32-33.

sanctions under § 809.25(3)(c), this court must make one of two findings:

> (1) The motion was filed, used, or continued "in bad faith, solely for purposes of harassing or maliciously injuring another"; [6] or
>
> (2) The party or party's attorney knew, or should have known, that the motion "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." [7]

The court made neither of these findings before it imposed sanctions. Yet, "as this court has emphasized, the [frivolous claims] statute does not allow the . . . [court] to conclude frivolousness or lack of it without findings stating which statutory criteria were present . . . ." [8]

The court never found that the motion was filed, used, or continued "in bad faith, solely for purposes of harassing or maliciously injuring another" under *Wis. Stat.* § 809.25(3)(c)1. Rather, this court merely stated, in a conclusory fashion, that on the basis of the untimeliness of the motion and its coming "shortly before oral argument in the United States Supreme Court," the "only reasonable inference" is that the motion "was filed in bad faith, for

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[6] Wis. Stat. § 809.25(3)(c)1.

[7] Wis. Stat. § 809.25(3)(c)2.

[8] *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994) (quoting *Sommer v. Carr*, 99 Wis. 2d 789, 792, 299 N.W.2d 856 (1981), interpreting *Wis. Stat.* § 814.025(3), which is precisely the same language as § 809.025(3)(c)).

As one commentator noted, appellate courts are "reluctant to utilize [§ 809.25(3)(c)], however, partly because it requires the court to make a finding." Michael S. Heffernan, Appellate Practice and Procedure in Wisconsin § 16.3b, at 16-5 (2d ed. 1995).

improper purposes, to undermine the public's confidence in the legitimacy of this court's decision and the integrity of this court as an institution." [9]

This court could not make the first required finding because the record does not contain sufficient facts to justify such a finding of subjective intent.[10] No basis exists in the record to conclude that the "sole" basis of the petitioners' motion was to harass Justice Wilcox, any other justice, or the court.

The court's opinion is absolutely silent regarding the second finding required under *Wis. Stat.* § 809.25(3)(c)2 that the motion was without reasonable basis in law or equity. This court never decided the merits of the challenge in the present case, that is, the court never decided whether Justice Wilcox erred in participating in *Jackson v. Benson*. That the petitioners' motion was denied because it was untimely is not the same as a finding that there was no reasonable basis in law or equity to bring the motion.

Because this court did not even come close to making either of the findings required under *Wis. Stat.* § 809.25(3)(c), the court cannot lawfully determine that the petitioners' motion was frivolous or impose sanctions under that section.

Under what authority then did the court determine that the petitioners' motion was frivolous and impose sanctions? This court had to search for another provision, not cited or relied on by the State's private counsel seeking sanctions, to reach the result it sought. So in footnote seven of the February 19, 2002 decision, the court states for the first and only time that it has "considered" the sanctions to be imposed "under both

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[9] *Jackson*, 249 Wis. 2d at 697, P24.

[10] Bad faith requires a factual determination of subjective intent. *Tomah-Mauston Broadcasting Co. v. Eklund*, 143 Wis. 2d 648, 658, 422 N.W.2d 169 (1988).

§§ 802.05(1)(a) and 809.25(3)." This court may have considered *Wis. Stat.* § 809.25(3), but as its decision clearly demonstrates, the court did not make the requisite findings of frivolousness and thus could not impose sanctions under that statute.

Therefore, this court must have determined frivolousness and imposed the sanctions under *Wis. Stat.* § 802.05(1)(a), the only other authority this court states that it considered. Section 802.05(1)(a) is a provision in chapter 802 governing procedure and practice in civil actions in circuit courts.[11] It requires an attorney to sign papers and states that the attorney's signature certifies that the attorney has determined that "the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." A circuit court may impose sanctions under § 802.05(1)(a) if the circuit court finds that the attorney has not determined that "the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

If this court were to rely on *Wis. Stat.* § 802.05(1)(a), should not the court have addressed the legal question of whether § 802.05(1)(a), which governs circuit court proceedings, applies in this case, given that § 809.25(3) already exists and explicitly covers sanctions for frivolous appeals?[12] The sanction provisions are scattered in the

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[11] *Wis. Stat.* § 801.01(2).

[12] By citing *Wis. Stat.* § 809.84, the decision seems to say that § 802.05 applies to the present case. Section 809.84, a default provision, provides that "an appeal to the court [of appeals or supreme court] is governed by the rules of civil procedure as to all matters not covered by these rules [in chapter 809] unless the circumstances of the appeal or the context of the rule of civil procedure requires a contrary result."

A citation to and quotation of *Wis. Stat.* § 809.84 does not suffice, however, to make § 802.05(1) applicable to the present case. First,

statutes and overlap and conflict.[13] For example, the only two statutes upon which the majority opinion relies conflict.

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§ 809.25 explicitly covers appellate procedure and § 809.25(3)(c) covers frivolous appeals. Thus, the very language of § 809.84 alerts the reader that § 802.05(1)(a) does not apply in the present case because the matter of frivolous appeals is covered in chapter 809 relating to appellate procedure.

Second, the context of *Wis. Stat.* § 802.05(1)(a) requires that it not be applied to proceedings in the supreme court. Section 802.05 initially covered only pleadings, not motions or other papers. There are no pleadings in appeals. Section 802.05(1)(a) was created by court rule and amended in 1987 by the legislature to include motions and other papers. There are motions in appeals. The 1987 amendment also created § 814.025(4), which provides that "to the extent § 802.05 is applicable and differs from [§ 814.025], § 802.05 applies." *See Wis. Stat.* § 814.025(4); Drafting File, 1987 Wisconsin Act 256, 1987 Sen. Bill 550, Legislative Reference Bureau, Madison, Wisconsin.

Section 814.025 was created by Laws 1977, ch. 209, and, like § 802.05(1)(a), governs costs and fees for frivolous litigation in the circuit courts. The February 19, 2002, decision does not refer to § 814.025. Sections 814.025 and 802.05 are, however, interconnected. Their interconnection demonstrates that both cover only circuit court actions.

To govern frivolous appeals, *Wisconsin Stat.* § 809.25(3) was created by 1981 Laws, ch. 316. The legislature used the same language in § 809.25(3) to govern frivolous appeals as it had in 1977 in § 814.025(3) to govern frivolous matters in the circuit courts. *See* Drafting Files Laws of 1981 ch. 316, 1981 Sen. Bill 823, Legislative Reference Bureau, Madison, Wisconsin. Nothing in § 809.25, however, refers to § 802.05 or determines which provision governs in the event of any conflict.

The interplay of *Wis. Stat.* §§ 802.05(1)(a), 809.25(3)(c), 809.84, and 814.025 demonstrates that the legislature intended §§ 802.05(1)(a) and 814.025 to govern frivolous matters in circuit courts and § 809.25(3)(c) to cover frivolous matters in appellate courts.

[13] The Judicial Council has recommended revision of the current law on sanctions for frivolous matters. *See* Amended Petition No. 99-07 filed with the Clerk of the Supreme Court, October 30, 2000. One of the objectives was to eliminate conflicting and overlapping provisions. For a

Section 809.25(3)(a) relating to appeals states that if an appeal is found frivolous the court shall award costs, while § 802.05(1)(a) relating to frivolous motions states that the court may impose costs. And should not the parties have been given an opportunity to present arguments on the legal question of the applicability of § 802.05(1)(a)[14] and to be accorded a hearing and present testimony and argument on the factual bases for the imposition of sanctions under § 802.05(1)(a)? The answer to these questions is clearly yes. But this court failed to take any such action.

Where are this court's findings about the frivolous claim if the court is imposing sanctions under *Wis. Stat.* § 802.05(1)(a)? There are none. Where did this court find, as it is required to do, that the attorneys did not make the determinations required under § 802.05(1)(a) that "the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"? The court made no such finding. The court merely concluded that "the only reasonable inference" is that the motion was for "improper purposes."

Furthermore, the court does not describe the "improper purposes" except to write, without explanation, that the purpose of the motion was "to undermine the public's confidence in the legitimacy of this court's decision and the integrity of this court as an institution."[15]

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further discussion of the need for revision of our law governing sanctions, *see also* Janine P. Geske & William C. Gleisner III, The Effect of Jandrt on Satellite Litigation, Wis. Lawyer, May 2000, at 11.

[14] For a critique of a court deciding issues that the court has identified on its own, *see* Adam A. Milani & Michael R. Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245 (2002).

[15] *Jackson*, 249 Wis. 2d at 697, P24.

Does this court consider it an improper purpose for a litigant to challenge a justice's impartiality? Does the court consider it an improper purpose for a litigant to attempt to vacate a decision so that any persuasive value of the decision would be diminished when a similar case is later argued before the U.S. Supreme Court? The proponents of school vouchers argued that "timing [of the filing of the motion to vacate] is so suspicious as to leave no other inference than that the movants [the petitioners] think nothing of using this Court's scarce resources in a larger, national battle over school choice."[16] But the Wisconsin school voucher law and this case have been of national interest since their inception.

The petitioners filed their motion six weeks before the U.S. Supreme Court was to hear an Ohio school voucher case.[17] This court issued its decision denying the motion to vacate *Jackson v. Benson* the day before the Ohio case was argued before the U.S. Supreme Court. Is the timing of these events coincidental? Does it matter? Lawyers frequently attempt to undermine cases that are not in their favor. They ask courts to distinguish, limit, vacate, or overrule prior cases. And this court has distinguished, limited, vacated, or overruled cases or has refused to do so. That is the common law process.

In sum, this court's decision declaring the motion frivolous and imposing sanctions is erroneous on its face as a matter of law. This court has failed to follow the law. It did not make

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[16] Memorandum in Opposition to Motion to Vacate and Motion for Attorney Fees and Costs Pursuant to *Wis. Stat.* § 809.25(3) at 33.

[17] The Ohio school voucher case before the U.S. Supreme Court is *Zelman v. Simmons-Harris*, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 533 U.S. 976, 122 S. Ct. 23 (2001).

On June 27, 2002, the U.S. Supreme Court upheld the constitutionality of the Ohio school voucher law on a 5-4 decision. *Zelman v. Simmons-Harris*, Nos. 00-1751, 00-1777, 00-1779, 2002 WL 1378554 (U.S. June 27, 2002).

the requisite findings under either *Wis. Stat.* § 809.25(3)(c) or § 802.05(1)(a). This court is not above the law. Therefore, the court should vacate Part II of its February 19, 2002, decision.

II

This cases raises additional concerns for me. I believe that the majority's decision about frivolousness and the imposition of sanctions are incompatible with this court's institutional responsibility to be open and accessible and to deal forthrightly with challenges and criticism.

Neither courts nor litigants should be subject to actions without substance. A significant purpose of the frivolous action provisions is to maintain the integrity of the judicial system. Yet a determination of frivolousness is "an especially delicate area; a court must be cautious in declaring an action frivolous." [18] This court must give the public wide berth to exercise its constitutional right "to petition the government for the redress of grievances." [19] Keeping this court open to people who are challenging a decision of this court on the basis of a justice's alleged bias is especially critical, because this court is the only venue where a party can make this kind of challenge.

This court is not immune from criticism. When dealing with challenges and criticism, the court has legitimate concerns about protecting its integrity and the integrity of the entire judicial system. But a court protects its integrity by seriously, forthrightly, and fully considering a challenge, not by acting in a way that belittles or appears to belittle the challenge or the challengers, that punishes or appears to punish challengers by imposing substantial costs and expenses, and that implicitly or explicitly tries to silence future critics

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[18] *Juneau County v. Courthouse Employees*, 221 Wis. 2d 630, 639-40, 585 N.W.2d 587 (1998) (internal quotation and citation omitted).

[19] U.S. Const. amend. I; Wis. Const. art. I, § 4.

and challengers with the threat of dire costs and expenses. Attorneys John Skilton and Mark Frankel rightly assert on behalf of the petitioners that the court's decision to declare this motion frivolous and to impose sanctions in the present case sends a chilling message to any person who might consider questioning a justice's impartiality and to any lawyer asked to represent that person. That is not the message this court should be sending.

If we are to protect the integrity of the judiciary, this court must ensure that it remains an institution that is open and accessible. It must not succumb to the temptation to silence challengers by attacking them personally or by diverting attention away from the merits of a challenge. Anyone challenging a decision of this court, the impartiality of a justice, or the integrity of this institution must receive a full, fair, and impartial hearing, without even a hint of recrimination, retribution, or retaliation. That is the message the court should be sending.

The court must be big enough in stature, strong enough in spirit, and gracious enough in action to respond fairly and fully on the merits to any challenge to its integrity, and then without vengeance or even the appearance of vengeance move on to our other business. The people of this state deserve no less.

I am disappointed in the court for not treating the challenge in the present case with the grace and dignity befitting this institution. Declaring the motion frivolous and imposing sanctions in the present case—in which the court is asked to sit in judgment on one of its own members—can too easily be read, in my opinion, as being spiteful. The imposition of sanctions can also be viewed as undermining confidence in the legitimacy of this court's decision-making and the integrity of this court as an institution.

Whether a challenge to a justice's impartiality undermines the court's integrity as an institution does not turn on the nature of the challenge. Rather, it turns on the nature of this court's response to that challenge. This court's response in the present case was and continues to be, in my opinion, flawed, whether viewed from the law applicable to frivolous appeals or from the vantage point of the court's institutional responsibilities.

For these reasons, I dissent from the denial of this motion for reconsideration.

APPENDIX B

SUPREME COURT OF WISCONSIN

[Filed Feburary 19, 2002]

No. 97-0270

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WISCONSIN, IN HIS OFFICIAL CAPACITY,
Defendant-Appellant.

MOTION TO VACATE DECISION

OPINION:

PER CURIAM Four of the twenty-nine plaintiffs-respondents [1] in *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998), *cert. denied*, 525 U.S. 997, 142 L. Ed. 2d 419, 119 S. Ct. 466 (1998), move this court to vacate its decision of June 10, 1998, upholding the constitutionality of the state's amended Milwaukee Parental Choice Program (MPCP). As grounds for their motion, the four respondents assert that they recently received new information that this court's decision was rendered by an improperly constituted panel because of the participation of a justice disqualified by law. The respondents seek to reinforce their motion by noting that the school choice issue is currently pending before the United States Supreme Court on a similar constitutional

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[1] Carl A. Gobel, Warner Jackson, Father Thomas J. Mueller, and Wendell Harris.

challenge to an Ohio school choice program. *See Zelman v. Simmons-Harris*, 234 F.3d 945 (6th Cir. 2000), *cert. granted*, 533 U.S. 976 (2001). Oral argument in Zelman is scheduled for February 20, 2002. The respondents assert that at least three parties to this court's decision in *Jackson v. Benson* who support school choice have submitted amicus briefs to the United States Supreme Court and are likely to have cited *Jackson v. Benson* as persuasive authority.

We dismiss the respondents' motion because it is untimely and frivolous as a matter of law. More than 1300 days have passed since this court issued its decision in *Jackson v. Benson*. More importantly, more than 600 days have passed since the information advanced by respondents in support of their disqualification claim [2] became publicly known.

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[2] Respondents contend that Justice Jon P. Wilcox was disqualified under Wis. Stat. § 757.19(2) and (3) (1999-2000), which provides:

> (2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:(a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.(c) When a judge previously acted as counsel to any party in the same action or proceeding.(d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.(e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.(3) Any disqualification that may occur under sub. (2) may be waived by agreement of all

Inasmuch as motions such as this constitute an attack on the integrity of this court's decisions, they must be brought promptly. This one was not. Respondents' inordinate and unexplained delay in raising the disqualification issue in a timely fashion constitutes a waiver of whatever objections they may have had in this regard and lead us to the conclusion that the motion to vacate is frivolous.

I

We set forth the significant facts surrounding *Jackson v. Benson* and respondents' claims that Justice Jon P. Wilcox should not have participated in the decision.

The constitutionality of the amended MPCP has been before this court on two occasions. In 1996 this court heard argument in an original action. On March 29, 1996, this court split three-three over the constitutionality of the amended MPCP, with Justice Wilcox voting to uphold it. *State ex rel. Thompson v. Jackson*, 199 Wis. 2d 714, 720, 546 N.W.2d 140 (1996). The case was remanded to Dane County Circuit Court, which later found the statute unconstitutional.

On April 1, 1997, Justice Wilcox won a ten-year term on this court, defeating Milwaukee attorney Walter Kelly by a margin of 185,437 votes. [3] On April 3, 1997, two days after the election, there was a press report that an anonymous group of individuals had spent an estimated $135,000 to print and mail as many as 450,000 postcards to support Justice

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parties and the judge after full and complete disclosure on the record of the factors creating such disqualification.

All subsequent statutory references to the Wisconsin Statutes are to the 1999-2000 volumes unless otherwise indicated.

[3] The vote totals were 476,900 for Justice Wilcox and 291,463 for Attorney Kelly. State of Wisconsin Blue Book at 870 (1997-98).

Wilcox's election.[4] In April 1997 Mark Block, the campaign manager for the Justice Wilcox for Justice Campaign (JWJC), admitted to the public that he had been contacted in January and March by the group that sent the postcards, but he did not identify the group. The names of the persons who gave the money were not revealed at that time, nor was it revealed that the donors were school choice proponents.

On June 16, 1997, an organization called The Wisconsin Coalition for Voter Participation (WCVP) was identified as the group that coordinated the postcard mailing. On July 30, 1997, the State Elections Board voted unanimously to investigate the anonymous mass mailing. The investigation ultimately revealed that WCVP made disbursements and incurred obligations of approximately $200,000 on mailings and telephone calls to targeted voters.

On August 22, 1997, the court of appeals, in a two-one decision, affirmed an order of the circuit court for Dane county, Paul B. Higginbotham, Judge, finding the amended MPCP unconstitutional. *Jackson v. Benson*, 213 Wis. 2d 1, 570 N.W.2d 407 (Ct. App. 1997). The majority of the court of appeals concluded that the amended MPCP was invalid under Article I, Section 18 of the Wisconsin Constitution because it directed payments of money from the state treasury for the benefit of religious seminaries. This court granted the state's petition for review on October 14, 1997. In late December 1997 the WCVP filed a lawsuit seeking to halt the investigation into possible ties between the group and the Wilcox campaign.

This court heard oral argument in *Jackson v. Benson* on March 4, 1998. The court issued its decision on June 10, 1998. Justice Steinmetz authored the majority opinion reversing the court of appeals. Justices Wilcox, Geske, and

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[4] Cary Segall, Expense for Wilcox Goes Unreported, Wisconsin State Journal, April 3, 1997.

Crooks joined the majority opinion. Chief Justice Abrahamson and Justice Bablitch dissented. Justice Bradley did not participate. On June 26, 1998, intervenors/respondents Parents For School Choice, *et al.*, filed a motion for clarification of the opinion, so that for a time a post-decision motion was pending before this court.[5] The motion was subsequently withdrawn. On November 9, 1998, the United States Supreme Court denied certiorari review.

In November 1999 the court of appeals allowed the State Elections Board to proceed in its investigation of the connection between the WCVP mailing and the Wilcox campaign, affirming the circuit court's dismissal of the WCVP's lawsuit to halt the investigation and have the mailing declared legal. *Coalition for Voter Participation v. Elections Bd.*, 231 Wis. 2d 670, 605 N.W.2d 654 (Ct. App. 1999), review denied, 231 Wis. 2d 377, 607 N.W.2d 293 (1999).

On March 22, 2000, the State Elections Board unanimously adopted the following motion:

> MOTION: TO EXPRESS THE SENSE OF THE ELECTIONS BOARD THAT JUSTICE JON WILCOX DID NOTHING ILLEGAL AND WAS NOT PERSONALLY RESPONSIBLE FOR ANY ILLEGAL ACTIVITIES OF HIS CAMPAIGN FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT, THE ELECTION FOR WHICH WAS HELD IN APRIL 1997; . . .

In the spring of 2000 the identities of the persons who contributed to the WCVP became publicly known.[6]

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[5] The respondents did not file any post-decision motion at this time.

[6] Cary Segall and Andy Hall, Big, Out-of-State Donors Weighed In For Court Case, Wisconsin State Journal, March 19, 2000; Cary Segall and

On March 20, 2001, the civil action brought by the State Elections Board against the JWJC and campaign manager Mark Block ended with a monetary settlement, stipulation, and order for dismissal. In a statement attached to the stipulation, Justice Wilcox stated:

> Last March the State Elections Board stated that it was the sense of the Board that I did nothing illegal and was not personally responsible for any illegal activities of my campaign. However, the Board's investigation has implicated my campaign manager and others in violations of the state's campaign finance law. I choose not to contest this. I acknowledge that I had a responsibility for the conduct of campaign staff. Therefore, as the candidate, I am funding my campaign committee so that the committee can pay a monetary penalty to settle this matter.

On January 9, 2002, respondents filed their motion to vacate the *Jackson v. Benson* decision, claiming that the facts set forth above demonstrate that Justice Wilcox was disqualified by law from participating in the case.

The general rule is that, after remittitur, the supreme court has no jurisdiction to vacate or modify its judgment. *Ott v. Boring*, 131 Wis. 472, 110 N.W. 824 (1907). Where a justice who participated in a case was disqualified by law the court's judgment in that case is void. *Case v. Hoffman*, 100 Wis. 314, 72 N.W. 390, remanded, 74 N.W. 220 (1898). We have previously stated, "an attack on the validity of a judgment of the state's highest court on the ground of a member's disqualification by law for an apparent inability to act impartially is not, nor can we conceive of it ever being, a 'routine matter.'" State v. American TV & Appliance, 151 Wis. 2d 175, 192, 443 N.W.2d 662 (1989). We have also

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Andy Hall, Wilcox Backers Revealed, GOP School-Choice Supporters Funded Secret Effort, Wisconsin State Journal, April 20, 2000.

said, however, that it behooves the court in the defense of its own legitimacy and of its integrity to consider a party's claim that a decision may be void because a justice should not have participated in the case. *City of Edgerton v. General Cas. Co.*, 190 Wis. 2d 510, 527 N.W.2d 305 (1995).

The chronology of events in this case demonstrates that the respondents were on notice by the spring of 2000 as to the identity of the donors to WCVP and their support of the school choice issue. Instead of bringing their motion at that time, the respondents remained silent for almost another two years, raising their disqualification objection on the eve of the United States Supreme Court's oral argument in another case raising the issue of the constitutionality of a private school voucher program.

Although respondents claim "it was not until a few months ago that information was made public casting a shadow on the 1997 supreme court election and highlighting the role of money in that election from the advocates for the defendants in a pending case," the record amply demonstrates that all information arguably pertinent to any disqualification issue in the case was publicly known by the spring of 2000. By failing to raise the issue in a timely fashion, respondents waived whatever objections they may have had to Justice Wilcox's participation in the court's decision.

We came to a similar conclusion in City of Edgerton. In that case Edgerton Sand & Gravel, Inc., (ES&G) moved to vacate this court's decision or, in the alternative, moved for a rehearing in the matter. Edgerton Sand & Gravel, Inc., argued that Justice Geske improperly participated in the case. At the outset of oral argument, Justice Geske stated on the record that the previous night she noted for the first time that one of the companies listed in the appendix to an amicus brief was St. Paul Companies, the employer of Justice Geske's husband. Justice Geske stated she did not believe that fact presented any conflict and it would not influence her. She

informed the parties that if anyone had any objections to her sitting on the case, she would appreciate hearing from them by letter by the end of the week.

No objection was raised by any of the parties until a non-party, Kenosha Auto Transport (KAT), raised the question of Justice Geske's participation in a proposed amicus brief KAT tendered to the court in support of a motion for reconsideration filed over seven months later. The motion to file an amicus brief was denied and the movants' request to seek Justice Geske's disqualification was dismissed. More than two months later ES&G filed a motion to vacate the decision, arguing that Justice Geske was disqualified under Wis. Stat. § 757.19(2) and (3) from participating in the original decision and asking for the vacation of the decision or, in the alternative, for rehearing without Justice Geske's participation. Edgerton Sand & Gravel, Inc., argued that Justice Geske's disclosure about her connection with St. Paul Companies had been incomplete.

The Edgerton court noted that the disqualification statute provides that any disqualification "may be waived by agreement of all parties and the judge after full and complete disclosure on the record of factors creating the disqualification." Wis. Stat. § 757.19(3). The Edgerton court found it significant that ES&G did not argue that Justice Geske's disclosure and her setting of a time limit to object or to waive objection to her participation in the case was not a proper procedural framework for the waiver of disqualification. Instead, ES&G argued Justice Geske's disclosure was not sufficient and did not constitute a "full and complete disclosure." The Edgerton court said:

> We conclude that under the circumstances of this case the disclosure made by Justice Geske was sufficient—that all the facts necessary for counsel to determine whether to assert or waive any disqualification were either disclosed or were readily obtainable of record

prior to the "weekend deadline" suggested by Justice Geske. Following that disclosure, if ES&G had been concerned, it could have examined the financial disclosures Justice Geske had filed with the Ethics Board and if those disclosures did not satisfy ES&G in respect to Justice Geske's financial ties to St. Paul Companies, it could have asked for more information from her or could have advised her "by the end of the week" that it objected to her participation.If ES&G's counsel examined the public record, it apparently did not deem the information in it sufficient to pursue the disqualification issue. Now, however, ES&G's substituted counsel asserts that Justice Geske's disqualification was required on the basis of inferences it makes from that information. Clearly, ES&G waived any possible disqualification by not acting by the "end of the week" and for one year following oral argument.Even after the court's decision on June 16, 1994—after learning that Justice Geske was the scrivener for the court—ES&G's counsel did not raise the question of Justice Geske's qualification to sit but asserted in its reconsideration motion only that the court had failed to follow what counsel considered controlling law. Despite the fact that ES&G had been served with a copy of KAT's proposed amicus motion and brief raising the disqualification issue, it did not join in KAT's motion or express to the court in its motion for reconsideration on the merits any position in respect to disqualification.Hence, we conclude that on at least two discrete occasions, ES&G's counsel failed to make any objection to Justice Geske's participation. These successive waivers in themselves bar ES&G from asserting its motion for vacatur at this time, months after it could have informed itself of the facts on which its motion is based and made any concern known to the court.

190 Wis. 2d at 518-19.

The same analysis applies with even greater force in this case. Although there was no judicial disclosure here, the basic facts upon which the respondents now rely in raising the issue of Justice Wilcox's participation were readily available as of the spring of 2000. Yet respondents did not raise the disqualification issue at that time; indeed, their inaction continued for almost another two years.

Not until January 9, 2002, twenty-one months after the identity of the donors to WCVP became publicly known, did respondents file a motion to vacate the decision. Respondents' delay in bringing the motion mandates a finding of waiver. Although respondents claim the motion was filed in January of 2002 because of "new information," this court has searched the entire record and found nothing "new." Instead, all of the facts arguably pertinent to the disqualification claim were well known in the spring of 2000.

The respondents' inordinate delay in filing the motion to vacate mocks the fundamental and vital principle of finality, which is essential to the operation of a society governed by law. *See Wittke v. State ex rel.* Smith, 80 Wis. 2d 332, 342, 259 N.W.2d 515 (1977). Motions such as this, having the potential to undermine the public's trust and confidence in the legitimacy of this court's decisions and the integrity and impartiality of this court as an institution, are very serious indeed, and, accordingly, must be raised in a timely fashion.

II

The State of Wisconsin and Marquelle Miller, *et al.*, ask this court to assess reasonable attorney fees and costs against respondents and their counsel pursuant to Wis. Stat.

§ 809.25(3).[7] We agree that the extraordinary untimeliness of the motion to vacate justifies a finding of frivolousness. The

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[7] Wisconsin Stat. § 809.25(3) provides:

> (3) Frivolous appeals. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section. A motion for costs, fees and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief, or if a cross-appeal is filed, the cross-respondent's brief.(b) The costs, fees and attorney fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs, fees and attorney fees.(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

Although the state and Marquelle Miller seek costs and attorneys fees under § 809.25(3), we note that § 802.05(1)(a) provides, in pertinent part,

> . . . The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the

fact that the motion was filed a mere six weeks before the scheduled oral argument of another state-funded private school voucher case in the United States Supreme Court calls the timing of and motives behind the respondents' motion into question.

We conclude that the motion to vacate, coming as it did almost two years after the public disclosure of the information pertinent to the respondents' claims and shortly before oral argument in the United States Supreme Court, was filed in bad faith, for improper purpose, to undermine the public's confidence in the legitimacy of this court's decision and the integrity of this court as an institution. The seriousness of a motion of this sort is not an excuse for tardiness in bringing it; to the contrary, the gravity of this type of motion compels that it be timely brought to ensure a prompt resolution. The only reasonable inference that can be drawn from the inordinate untimeliness and suspect timing of this motion is that it was brought in bad faith for improper purpose. Any other conclusion would seriously undermine the concept of frivolousness. We grant the motions of the state and Marquelle Miller, et. al., for an award of reasonable attorney fees and costs incurred in responding to the motion to vacate. We remand the matter to the Dane County Circuit Court for a determination of the amount of reasonable attorney fees and costs.

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filing of the pleading, motion or other paper, including reasonable attorney fees.

Section 809.84 provides: an appeal to the court is governed by the rules of civil procedure as to all matters not covered by these rules unless the circumstances of the appeal or the context of the rule of civil procedures requires a contrary result.

We thus consider the state's and Marquelle Miller's motions under both §§ 802.05(1)(a) and 809.25(3).

JON P. WILCOX and ANN WALSH BRADLEY, JJ., did not participate.

CONCUR BY: SHIRLEY S. ABRAHAMSON (In Part)

DISSENT BY: SHIRLEY S. ABRAHAMSON (In Part)

DISSENT: SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE *(concurring in part, dissenting in part).* I join only Part I of the court's opinion. I do not join Part II of the opinion remanding the matter to the Dane County Circuit Court to determine the amount of reasonable attorney fees and costs for a frivolous action. This proceeding ought to end now.

APPENDIX C

SUPREME COURT OF WISCONSIN

Appeal No. 97-0270

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et al.*,
Respondents.

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

AFFIDAVIT OF DIANE L. MILLIGAN

NOW COMES Diane L. Milligan being duly sworn and upon oath, deposes and states as follows:

1. I am an attorney for the Petitioners in the above-referenced matter.

2. In March and April, 2001, I contacted Tom Dosch at the Wisconsin Department of Justice to obtain copies of the settlement agreements associated with the Elections Board lawsuit. On April 2, 2001, Mr. Dosch indicated that the case was still open against WCVP and James Wigderson.

3. On April 5, 2001, my firm obtained copies of some of the settlement documents, as listed in the April 5, 2001 letter from Assistant Attorney General Thomas L. Dosch, attached hereto as Exhibit A. Copies of these documents are attached hereto as Exhibit A-1 (Mark Block stipulation, statement, order and judgment) and

Exhibit A-2 (Justice Wilcox For Justice Committee Stipulation, Justice Wilcox's statement (Appendix A), order and judgment. Attached as Exhibit B is Attorney Dosch's April 19, 2001 letter, together with the stipulation, statement, order and judgment for Brent J. Pickens.

4. During January, 2002, after reviewing the Respondents' memoranda, I began research for our reply. I prepared an argument about the relevant timeframe, the notion of harmless error and margin of victory in court panel decisions; I researched the waiver issue, the concept of "recent" as employed by the Court, the factual record, frivolousness, and the propriety of overruling *American TV* in light of U.S. Supreme Court precedent.

5. On or about January 29, 2002, I telephoned the Clerk of the Wisconsin Supreme Court to ascertain our deadline for replying to the Respondents' memoranda.

6. The clerk told me that we would not have an opportunity to reply. She said that if the Court wanted a reply, they would tell us so and give us a deadline.

7. I ceased my research on January 29, 2002, and waited for the Court's response.

Dated this 8th day of March, 2002.

/s/ Diane L. Milligan
DIANE L. MILLIGAN

Subscribed and Sworn to before me this 8th day of March, 2002.

/s/ Pamela R. McGillivray
PAMELA R. MCGILLIVRAY
Notary Public, State of Wisconsin
My Commission is permanent

[LOGO] STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL
Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857
Thomas L. Dosch
Assistant Attorney General
doschtl@doj.state.wi.us
608/266-0770
FAX 608/266-2250

April 5, 2001

Ms. Diane Milligan
Garvey & Stoddard SC
634 W Main St #201
Madison, W1 53703-2697

Re: Elections Board of the State of Wisconsin v. Mark J. Block, et al. Case No. 00-CV-797

Dear Diane:

Enclosed are copies of the signed Stipulations for Mark Block and Justice Wilcox for Justice Committee, and a copy of the signed Judgment against Mark Block that you requested. I will send copies of the Pickens' documents when I receive them.

Sincerely,

/s/ Thomas L. Dosch/drm
THOMAS L. DOSCH
ASSISTANT ATTORNEY GENERAL

TLD:drm
Enclosures

EXHIBIT A

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

Case No. 00-CV-797

ELECTIONS BOARD OF THE STATE OF WISCONSIN,
Plaintiff,

v.

MARK J. BLOCK, BRENT J. PICKENS, JAMES M. WIGDERSON, WISCONSIN COALITION FOR VOTER PARTICIPATION, and JUSTICE WILCOX FOR JUSTICE COMMITTEE,
Defendants.

STIPULATION AND ORDER FOR JUDGMENT (DEFENDANT MARK J. BLOCK)

The Elections Board of the State of Wisconsin ("the Board") brought this action alleging that defendants violated various state campaign finance laws in the course of the election in Spring 1997 for Justice of the Wisconsin Supreme Court. In order to settle this matter without further litigation, the Board, by its Executive Director, Kevin J. Kennedy, and, at the request of the Board, by James E. Doyle, Attorney General, John S. Greene, Assistant Attorney General, and Thomas L. Dosch, Assistant Attorney General, and defendant Mark J. Block, by his counsel Michael P. Crooks, hereby stipulate as follows:

1. In settlement of the violations alleged in the complaint against defendant Block, judgment shall be granted in favor of plaintiff, Elections Board of the State of Wisconsin, against Mark J. Block in the amount of $15,000.00. The judgment shall be satisfied once payment in full is received and defendant Block has discharged all other obligations under this stipulation.

That sum is comprised of forfeitures in the amount of $12,033 pursuant to Wis. Stat. §§ 11.38(4), 11.60(1), 11.60(2), and 11.60(3); a penalty assessment of $2,768 pursuant to Wis. Stat. § 757.05(1); a jail assessment of $120 pursuant to Wis. Stat. § 814.63(3)(g); a court fee of $25 pursuant to Wis. Stat. § 814.63(1)(b); a crime lab and drug assessment fee of $5 pursuant to Wis. Stat. § 814.63(3)(am); a court support services fee of $40 pursuant to Wis. Stat. § 814.634(10(a)); and a justice information system fee of $9 pursuant to Wis. Stat. § 814.635(1).

2. Defendant Block shall pay $5000 of the judgment no later than 30 days following entry of judgment. Defendant Block shall pay the remainder of the judgment ($10,000) in four equal annual installments of $2,500 to be paid by the anniversary of the entry of judgment in each succeeding year. All checks shall be drawn to the order of the State of Wisconsin and delivered to the Executive Director of the Elections Board of the State of Wisconsin.

3. No interest shall be charged if defendant Block complies with the payment schedule set forth in the preceding paragraph. The forbearance of interest is contingent upon defendant Block making timely payments pursuant to the schedule set forth in the preceding paragraph. If defendant Block fails to make a payment when due, defendant Block shall, at plaintiffs option, pay interest at the rate of 12% annually on the full judgment amount commencing on the date judgment was entered, taking into account the payments made by defendant Block.

4. All monies used to pay the judgment shall come exclusively from defendant Block, or from bona fide loans to him that he repays in full.

5. Defendant Block shall sign and acknowledge the statement attached as Appendix A of this stipulation.

6. Defendant Block shall cooperate in the litigation of this action against other defendants, including testifying willingly and truthfully in proceedings relating to this action, including depositions and trial, subject to defendant Block's assertion of any available constitutional privileges.

7. Defendant Block agrees he will not work on or participate in any political campaign, either on a paid or unpaid basis, prior to January 1, 2004.

8. The judgment granted herein fully resolves all violations alleged in the complaint against Mark Block. At the request of defendant Block, the Elections Board agrees it will make no referral to a district attorney or the attorney general, pursuant to Wis. Stat. § 5.05(3)(a), seeking his prosecution for alleged violations of state campaign finance laws during the course of the campaign for the 1997 election to the Wisconsin Supreme Court.

Dated: 3/5/01
ELECTIONS BOARD OF THE
STATE OF WISCONSIN

/s/ Kevin J. Kennedy
KEVIN J. KENNEDY
Executive Director

Dated: 3/11/01

/s/ Mark J. Block,
MARK J. BLOCK, Defendant

Dated : 3/16/01
PETERSON, JOHNSON
& MURRAY, S.C.

/s/ Michael P. Crooks
MICHAEL P. CROOKS
Attorneys for
Defendant Block

ORDER

Based upon the foregoing stipulation of the parties, IT IS HEREBY ADJUDGED AND DECREED that judgment is granted to the plaintiff and against the defendant Mark J. Block in the total amount of $15,000. The terms and conditions of the stipulation between the parties shall be incorporated into the judgment. The clerk is directed to enter judgment accordingly.

Dated this 20th day of March, 2001.

BY THE COURT:

/s/ Robert R. Pekowsky
ROBERT R. PEKOWSKY
Reserve Judge

Appendix A

Statement by Mark J. Block

The Elections Board of the State of Wisconsin has alleged that I and others violated state campaign finance laws in connection with the spring 1997 election of Justice Jon Wilcox to the Wisconsin Supreme Court. I acknowledge that the Elections Board may be able to prove violations of those laws should this case proceed to trial. I recognize that my conduct has undermined public confidence in the integrity of the state electoral process. I apologize to the people of the State of Wisconsin.

/s/ Mark J. Block
MARK J. BLOCK

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

Case No. 00-CV-797
Unclassified—Civil: 30703

ELECTIONS BOARD OF THE STATE OF WISCONSIN
132 East Wilson Street
Madison, Wisconsin 53702,

Plaintiff,

v.

MARK J. BLOCK
Individually and as an agent of the
Justice Wilcox for Justice Committee
18125 West Plateau Lane New
Berlin, Wisconsin 53146,

BRENT J. PICKENS
Individually and as an agent of
Wisconsin Coalition for Voter Participation
W218 N14225 Hilltop Court
Richfield, Wisconsin 53076,

JAMES M. WIGDERSON
Individually and as an officer of
Wisconsin Coalition for Voter Participation
6949 West Robinwood Lane
Franklin, Wisconsin 53132,

WISCONSIN COALITION FOR
VOTER PARTICIPATION
a Wisconsin corporation
4806 Eldorado Lane
Madison, Wisconsin 53716,

JUSTICE WILCOX FOR JUSTICE COMMITTEE,
a Wis. Stat. § 11.05(2g) personal campaign committee
1620 North Golf Glen
Madison, Wisconsin 53704,

Defendants.

JUDGMENT AGAINST DEFENDANT MARK J. BLOCK

Based on the stipulation of the parties and the court's order, judgment is hereby granted in favor of the plaintiff, Elections Board of the State of Wisconsin, and against defendant Mark J. Block in the amount of fifteen thousand dollars ($15,000.00). That sum is comprised of forfeitures in the amount of $12,033 pursuant to Wis. Stat. §§ 11.38(4), 11.60(1), 11.60(2), and 11.60(3); a penalty assessment of $2,768 pursuant to Wis. Stat. § 165.87(2); a jail assessment of $120 pursuant to Wis. Stat. § 814.63(3)(g); a court fee of $25 pursuant to Wis. Stat. § 814.63(1)(b); a crime lab and drug assessment fee of $5 pursuant to Wis. Stat. § 814.63(3)(am); a court support services fee of $40 pursuant to Wis. Stat. § 814.634(10(a)); and a justice information system fee of $9 pursuant to Wis. Stat. § 814.635(1). In addition, the remaining terms of the stipulation are incorporated into this judgment.

Defendant is an adult residing at 18125 West Plateau Lane, New Berlin, Wisconsin.

Dated this 21st day of March, 2001.

BY THE COURT

/s/ [Illegible]
Clerk of Circuit Court, Dane County

/s/ Melissa Hanberg
Deputy Clerk

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

Case No. 00-CV-797

ELECTIONS BOARD OF THE STATE OF WISCONSIN,
Plaintiff,

v.

MARK J. BLOCK, BRENT J. PICKENS, JAMES M. WIGDERSON, WISCONSIN COALITION FOR VOTER PARTICIPATION, and JUSTICE WILCOX FOR JUSTICE COMMITTEE,
Defendants.

STIPULATION AND ORDER FOR DISMISSAL (DEFENDANT JUSTICE WILCOX FOR JUSTICE COMMITTEE)

The Elections Board of the State of Wisconsin ("the Board") brought this action alleging that defendants violated various state campaign finance laws in the course of the election in Spring 1997 for Justice of the Wisconsin Supreme Court. In order to settle this matter without further litigation, the Board, by its Executive Director, Kevin J. Kennedy, and, at the request of the Board, by James E. Doyle, Attorney General, John S. Greene, Assistant Attorney General, and Thomas L. Dosch, Assistant Attorney General, and defendant Justice Wilcox for Justice Committee (JWJC), by its counsel Daniel W. Hildebrand, hereby stipulate as follows:

1. Defendant JWJC shall pay the amount of $10,000 to the Elections Board, pursuant to Wis. Stat. § 5.05(1)(c). The check shall be drawn to the order of the State of Wisconsin and delivered to the Executive Director of the Elections Board of the State of Wisconsin.

2. Upon receipt of the payment described in paragraph 1, the Elections Board shall submit this stipulation and proposed order to the court, and request that the court dismiss this action as against defendant JWJC, with prejudice.

3. Justice Wilcox shall sign and acknowledge the statement attached as Appendix A of this stipulation.

4. Justice Wilcox and any officer or agent of JWJC shall cooperate in the litigation of this action against other defendants, including testifying in any proceedings relating to this action, including depositions and trial.

5. This stipulation fully resolves all violations alleged in the complaint against JWJC.

Dated: March 5, 2001

ELECTIONS BOARD OF THE
STATE OF WISCONSIN

/s/ Kevin J. Kennedy
KEVIN J. KENNEDY
Executive Director

Dated: March 5, 2001

JUSTICE WILCOX FOR JUSTICE
COMMITTEE

/s/ Jon P. Wilcox
JON P. WILCOX

Dated: March 5, 2001

DeWITT, ROSS & STEVENS, S.C.

/s/ Daniel W. Hilderbrand
DANIEL W. HILDEBRAND
Attorneys for Defendant JWJC

ORDER

Based upon the foregoing stipulation of the parties, IT IS HEREBY ORDERED that this action is dismissed, with prejudice, with respect to all claims asserted against defendant Justice Wilcox for Justice Committee.

Dated this 20th day of March, 2001.

BY THE COURT:

/s/ Robert R. Pekowsky
ROBERT R. PEKOWSKY
Reserve Judge

Appendix A

Statement by Justice Jon P. Wilcox

Last March the State Elections Board stated that it was the sense of the Board that I did nothing illegal and was not personally responsible for any illegal activities of my campaign. However the Board's investigation has implicated my campaign manager and others in violations of the state's campaign finance law. I choose not to contest this. I acknowledge that I had a responsibility for the conduct of campaign staff. Therefore, as the candidate, I am funding my campaign committee so that the committee can pay a monetary penalty to settle this matter.

/s/ Jon P. Wilcox
JON P. WILCOX

[SEAL] STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL
Burneatta L. Bridge
Deputy Attorney General

123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Thomas L. Dosch
Assistant Attorney General
doschtl@doj.state.wi.us
608/266-0770
FAX 608/266-2250

April 19, 2001

Ms. Diane Milligan
Garvey & Stoddard SC
634 W Main St #201
Madison, WI 53703-2697

Re: Elections Board of the State of Wisconsin v. Mark J. Block, et al. Case No. 00-CV-797

Dear Diane:

Enclosed is a copy of the signed Stipulation for Brent J. Pickens, and a copy of the signed Judgment Against Defendant Brent J. Pickens that you requested.

Sincerely,

/s/ Thomas L. Dosch
THOMAS L. DOSCH
Assistant Attorney General

TLD:drm

Enclosures

EXHIBIT B

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

Case No. 00-CV-797
Unclassified—Civil: 30703

ELECTIONS BOARD OF THE
STATE OF WISCONSIN
132 East Wilson Street
Madison, Wisconsin 53702,

Plaintiff,

v.

MARK J. BLOCK
Individually and as an agent of the
Justice Wilcox for Justice Committee
18125 West Plateau Lane
New Berlin, Wisconsin 53146,

BRENT J. PICKENS
Individually and as an agent of
Wisconsin Coalition for Voter Participation
W218 N14225 Hilltop Court
Richfield, Wisconsin 53076,

JAMES M. WIGDERSON
Individually and as an officer of
Wisconsin Coalition for Voter Participation
6949 West Robinwood Lane
Franklin, Wisconsin 53132,

WISCONSIN COALITION FOR
VOTER PARTICIPATION
a Wisconsin corporation
4806 Eldorado Lane
Madison, Wisconsin 53716,

JUSTICE WILCOX FOR JUSTICE COMMITTEE,
a Wis. Stat. § 11.05(2g) personal campaign committee
1620 North Golf Glen
Madison, Wisconsin 53704,

Defendants.

JUDGMENT AGAINST DEFENDANT
BRENT J. PICKENS

Based on the stipulation of the parties and the court's order, judgment is hereby granted in favor of the plaintiff, Elections Board of the State of Wisconsin, and against defendant Brent J. Pickens in the amount of thirty five thousand dollars ($35,000.00). That sum is comprised of forfeitures in the amount of $28,162 pursuant to Wis. Stat. §§ 11.38(4), 11.60(1), 11.60(2), and 11.60(3); a penalty assessment of $6,477 pursuant to Wis. Stat. § 757.05(1); a jail assessment of $282 pursuant to Wis. Stat. § 814.63(3)(g); a court fee of $25 pursuant to Wis. Stat. § 814.63(l)(b); a crime lab and drug assessment fee of $5 pursuant to Wis. Stat. § 814.63(3)(am); a court support services fee of $40 pursuant to Wis. Stat. § 814.634(10(a)); and a justice information system fee of $9 pursuant to Wis. Stat. § 814.635(1). In addition, the remaining terms of the stipulation are incorporated into this judgment.

Defendant is an adult residing at W218 N14225 Hilltop Court, Richfield, WI 53076.

Dated this 3rd day of April, 2001.

BY THE COURT:

/s/ Dawn Hensen
DAWN HENSEN
Clerk of Circuit Court, Dane County

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

Case No. 00-CV-797

ELECTIONS BOARD OF THE STATE OF WISCONSIN,
Plaintiff,

v.

MARK J. BLOCK, BRENT J. PICKENS; JAMES M. WIGDERSON, WISCONSIN COALITION FOR VOTER PARTICIPATION, and JUSTICE WILCOX FOR JUSTICE COMMITTEE,
Defendants.

STIPULATION AND ORDER FOR JUDGMENT (DEFENDANT BRENT J. PICKENS)

The Elections Board of the State of Wisconsin ("the Board") brought this action alleging that defendants violated various state campaign finance laws in the course of the election in Spring 1997 for Justice of the Wisconsin Supreme Court. In order to settle this matter without further litigation, the Board, by its Executive Director, Kevin J. Kennedy, and, at the request of the Board, by James E. Doyle, Attorney General, John S. Greene, Assistant Attorney General, and Thomas L. Dosch, Assistant Attorney General, and defendant Brent J. Pickens, by his counsel Joseph C. Koltz, hereby stipulate as follows:

1. For the violations alleged in the complaint against defendant Pickens, judgment shall be granted in favor of plaintiff, Elections Board of the State of Wisconsin, against Brent J. Pickens in the amount of $35,000.00.

That sum is comprised of forfeitures in the amount of $28,162 pursuant to Wis. Stat. §§ 11.38(4), 11.60(1); 11.60(2), and 11.60(3); a penalty assessment of $6,477 pursuant to Wis. Stat. § 757:05(1); a jail assessment of $282 pursuant to Wis. Stat. § 814.63(3)(g); a court fee of

$25 pursuant to Wis. Stat. § 814.63(1)(b); a crime lab and drug assessment fee of $5 pursuant to Wis. Stat. § 814.63(3)(am); a court support services fee of $40 pursuant to Wis. Stat. § $14.634(10(a)); and a justice information system fee of $9 pursuant to Wis. Stat. § 814.635(I).

2. Defendant Pickens shall pay $1,000 of the judgment no later than 15 days following entry of judgment. Defendant Pickens shall pay an additional $1,500 no later than June 30, 2001 and $2,500 no later than December 31, 2001. Defendant Pickens shall pay the remainder of the judgment ($30,000) in twelve equal semi-annual installments of $2,500 to be paid on June 30th and December 31st in each succeeding year. All checks shall be drawn to the order of the State of Wisconsin and delivered to the Executive Director of the Elections Board of the State of Wisconsin.

3. No interest shall be charged if defendant Pickens complies with the payment schedule set forth in the. preceding paragraph. The forbearance of interest is contingent upon defendant Pickens making timely payments pursuant to the schedule set forth in the preceding paragraph. If defendant Pickens fails to make a payment when due, defendant Pickens shall, at plaintiffs option; pay interest at the rate of 12% annually on the full judgment amount commencing on the date judgment was entered, taking into account the payments made by defendant Pickens.

4. All monies used to pay the judgment shall come exclusively from defendant Pickens, or from bona fide loans to him that he repays in full.

5. Defendant Pickens shall sign and acknowledge the statement attached as Appendix A of this stipulation.

6. In addition, defendant Pickens shall cooperate in the litigation of this action against other defendants,

including testifying willingly and truthfully in proceedings relating to this action, including depositions and trial, subject to defendant Pickens' assertion of any available constitutional privileges.

7. For a period of five years following entry of judgment, defendant Pickens agrees he will not work on or participate in any political campaign for national, state or local office, either on a paid or unpaid basis.

8. The judgment granted herein fully resolves all violations alleged in the complaint against Brent J. Pickens. At the request of defendant Pickens, the Elections Board agrees it will make no referral to a district attorney or the attorney general, pursuant to Wis. Stat. § 5.05(3)(a), seeking his prosecution for alleged violations of state campaign finance laws during the course of the campaign for the 1997 election to the Wisconsin Supreme Court.

Dated: March 5, 2001

ELECTIONS BOARD OF THE
STATE OF WISCONSIN

/s/ Kevin J. Kennedy
KEVIN J. KENNEDY
Executive Director

Dated: 3-22-01

/s/ Brent J. Pickens
BRENT J. PICKENS, Defendant

Dated: 3-7-01

RUMMEL & KOLTZ

/s/ Joseph C. Koltz
JOSEPH C. KOLTZ
Attorneys for Defendant Pickens

ORDER

Based upon the foregoing stipulation of the parties, IT IS HEREBY ADJUDGED AND DECREED that judgment on the complaint is granted to the plaintiff and against the defendant Brent J. Pickens in the total amount of $35,000. The terms and conditions of the stipulation between the parties shall be incorporated into the judgment. The clerk is directed to enter judgment accordingly.

Dated this 3rd day of April 2001.

BY THE COURT:

/s/ Robert R. Pekowsky
ROBERT R. PEKOWSKY
Reserve Judge

Appendix A

Statement by Brent J. Pickens

The Elections Board of the State of Wisconsin has alleged that I and others violated state campaign finance laws in connection with the spring 1997 election of Justice Jon Wilcox to the Wisconsin Supreme Court. I acknowledge that the Elections Board could prove violations of those laws should this case proceed to trial. I recognize that my conduct has undermined public confidence in the integrity of the state electoral process. I apologize to the people of the State of Wisconsin.

/s/ Brent J. Pickens
BRENT J. PICKENS

APPENDIX D

SUPREME COURT OF WISCONSIN

Appeal No. 97-0270

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et. al.*,
Respondents.

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

AFFIDAVIT OF EDWARD R. GARVEY

NOW COMES Edward R. Garvey, being first duly sworn, upon oath, deposes and states as follows:

1. I am an attorney and have been licensed to practice in this Court since 1969. I am the lawyer who signed the motion which is the subject of the sanctions ordered in part II of this Court's February 19, 2002 decision in the above-captioned case.

2. I have been an active participant in Wisconsin politics for many years and in the last several years I have been actively involved in several organizations seeking reform of our election laws. I have been particularly interested in the corrosive effect which money and special interest groups have had on our elected judiciary and other branches of government, and therefore, founded what became known as the "Heffernan Commission" to look for solutions to this problem.

3. Because of my interest in election law reform, I had considerable interest in the 1997 race between Justice Wilcox and Attorney Walter Kelly, as well as the very public fallout therefrom. I also closely followed the post-election investigation by the Elections Board of the State of Wisconsin as reported in the press. As has already been shown to this Court, that investigation was delayed for a period of approximately two years as the result of an action filed by the Wisconsin Coalition for Voter Participation, Inc, James Wigderson, Brent Pickens and Mark Block.

4. Until April 5, 2001, my primary source of information was the press, although in 2000, at my instruction, my office requested on September 26, 2000, (at our own expense) a copy of the depositions taken in connection with the Elections Board investigation. My recollection is that we received the depositions in October of 2000.

5. In late March 2001, I received a call from Attorney Kelly about settlement documents which he believed then existed in the Elections Board case. Attorney Kelly informed me that he was having difficulty obtaining these documents. I told him we would attempt to obtain them.

6. On April 5, 2001, my firm obtained copies of some of the settlement documents, as recounted in paragraph 3 of the March 6, 2002, Affidavit of Diane Milligan filed herein. Based on my review of these documents, I came to the conclusion that several "admissions" of unlawful conduct, together with the March 20, 2001, statement of Justice Wilcox himself, constituted sufficiently probative evidence to support a strong argument that Justice Wilcox should not have participated in the above-captioned case. In particular, it was my opinion that the concession of Justice

Wilcox himself, in combination with what was publicly known *before* the case was argued, under the law, as I understood it, should have either caused him to recuse himself from the *Jackson* case or at the very least, caused him to give the parties an opportunity to challenge his participation in advance of the argument, as did Justice Geske in the *City of Edgerton* case. Justice Wilcox stated (attached hereto as Exhibit A) as follows:

> Last March the State Elections Board stated that it was the sense of the Board that I did nothing illegal and was not personally responsible for any illegal activities of my campaign. However the Board's investigation has implicated my campaign manager and others in violations of the state's campaign finance law. I choose not to contest this. I acknowledge that I had a responsibility for the conduct of campaign staff. Therefore, as the candidate, I am funding my campaign committee so that the committee can pay a monetary penalty to settle this matter.

7. Regardless of what I may have suspected prior to my review of these settlement documents—indeed, regardless of what the press was saying—as I knew that there was in fact an ongoing investigation, it was my opinion that until that investigation was completed and *the results* were known—particularly as I knew that Justice Wilcox himself had participated in the investigation—it was not appropriate (or prudent) for any party to approach the Court to ask for relief resulting from Justice Wilcox's participation in the *Jackson* case. Justice Wilcox, after all, was entitled to his day in court. Once I knew the results, however, I concluded that there was not only a basis to approach, but that the Court should be approached concerning

Justice Wilcox's participation. But, at that time, I had no client and no challenge could be made without "standing."

8. In August, 2001, at a meeting called for other purposes, I discussed my conclusions concerning the consequences of the Election Board case settlement with Mr. Sam Carmen, Executive Director, Milwaukee Teachers Association (MTEA) and Mr. John Matthews, of Madison Teachers Incorporated (MTI). Both were extremely interested in my conclusions: MTEA had been a plaintiff below and Mr. Matthews was concerned about the possible spread of vouchers to the Madison area. I was asked to research the issues and report back to them. While no formal retainer agreement was signed or proposed, I believed that an attorney-client relationship began at that meeting.

9. Thereafter my firm researched the issues, including the issue of timeliness, and then drafted a motion in the name of both Mr. Carmen and MTEA.

10. On or about the 10th of September, 2001 I again met with Mr. Carmen and Mr. Matthews, this time to review the draft motion. However, my firm was not given authority to proceed at that time.

11. I also considered but rejected the possibility of filing a complaint with the Judicial Commission because under existing case law, as I understood it, even if Justice Wilcox were to be disciplined, such action would have no impact on the *bona fides* of the *Jackson* case. And it was not my purpose to seek discipline upon Justice Wilcox, but to seek relief from his participation in the *Jackson* case. Thus, we decided that if we were to proceed, it would be to challenge the *Jackson* decision itself.

12. When the first draft of the motion was prepared, there was no discussion whatsoever regarding (or consideration given to) the *Cleveland* case (that was subsequently heard by the United States Supreme Court in February, 2002). The focus was exclusively on the *Jackson* case. However, there was discussion that should a case someday reach the United States Supreme Court, the *Jackson* case would probably be cited by pro-voucher advocates.

13. After the September 10, 2001, meeting, a second draft of the motion was circulated to some of the organizations that had participated in the *Jackson* case. The process of determining who would join in the filing took several more weeks. (This Court is aware that the NAACP joined by filing a separate brief in support of the motion.)

14. On what I thought was to be the eve of filing the Motion, MTEA opted to be removed from the Motion. This caused further delay.

15. In early December, 2001, I met with the four named Petitioners and the decision was then made to proceed with the filing. The final draft was then prepared and circulated in mid-December, 2001, with final approval obtained in late December, 2001.

16. The Movants were Warner Jackson, after whom the case is named, an adult resident of the City of Milwaukee, whose occupation is customer service manager; Carl Gobel, an adult resident of the City of Milwaukee, who is a retired school administrator; Wendell Harris, an adult resident of the City of Milwaukee, whose occupation is an operator of a transit bus service; and Father Thomas Mueller, an adult resident of the City of Milwaukee, whose occupation is a Greek Orthodox Priest.

17. My arguments in support of the merits of the Motion are set forth in the Motion itself. I believed when I filed the Motion, and I believe now, that all arguments in the Motion were meritorious. The Motion was the product of careful research of the law and the facts and that the relief sought was both available and meaningful. I also held the opinion, based on my research of the law, that there was no statute or legal principle which precluded the filing of this motion on behalf of these Movants at this time. My purpose was not to harm Justice Wilcox or the Court but rather to attempt to obtain a rehearing of the *Jackson* case.

18. Upon receipt of the response in the name of the State, my Associate, Diane Milligan, asked the Court the reply deadline and she was told that we would not be permitted to reply. Attorney Milligan's separate affidavit stating these facts on personal knowledge is filed herewith.

19. Had I been permitted to reply to the brief filed on behalf of the State of Wisconsin, the facts set forth herein would have been recited. In summary, I first had completed a review of what I believed to be sufficiently adequate and competent evidence to file a motion no earlier than late April, 2001. I could not file a Motion then as I had no client with standing. I did not have authority to file on behalf of a client with standing until early December, 2001. Thereafter, we proceeded expeditiously. The suggestion that we could have filed a Motion as early as May of 2001, some 200 days before the actual filing, is factually incorrect. As for the named Movants, they had no idea *until late in 2001* that they even had a right to approach the Court to vacate the *Jackson* decision.

20. In 2000 and 2001, my firm consisted of two shareholders, two full-time associates and one part-time

associate. Particularly in light of the serious nature and consequences of filing an "untimely" motion, we took the time to carefully investigate the facts and research the law before we filed. Much of the research and analysis was done by my colleague, Diane Milligan, as set forth in paragraph 4 of her Affidavit, although I read and was quite familiar with the seminal cases. In my opinion, in doing so, we complied with all duties and obligations we had to this Court, to our clients, and to our oath as lawyers.

21. The conclusion of this Court that my firm and these four citizen Petitioners intentionally and in bad faith delayed the filing of the Motion is both unfair and contrary to fact. While the focus may well be on the attorneys, it must be remembered that I represented citizens whose only concern is with the Milwaukee Public school system, the quality of education obtained by the children of that city, and the separation of church and state. While the delay was characterized as "unexplained" by the Court, that delay remained unexplained only because the Court did not permit us to reply. To the contrary, as shown herein, we proceeded diligently once the issue had ripened, after April, 2001, and once we had a green light to proceed from those with standing in late December, 2001. There was no conceivable reason to delay making this Motion other than to await the results of an investigation into the merits of the issues by the State agency charged with the duty of enforcing the election laws of the State of Wisconsin.

22. The conclusion that the filing date was timed to coincide with the arguments in the *Cleveland* case is simply incorrect. Whether or not the United States Supreme Court had accepted a school voucher case for argument, we were determined to file the Petition in

the instant case because the due process rights of plaintiffs had, in our opinion, been denied. The fact that the United States Supreme Court decided to hear a case with similar issues tended to underscore the proposition that our request for rehearing of the *Jackson* case was not a request for an academic exercise. The issues dealt with in *Jackson* are alive today as they were in 1997 and predictably will be for many years. It was also our opinion, at the time we filed, that if this Court agreed that in fact the *Jackson* case should be reheard, it would be better for it to make that decision before, rather than after, the *Cleveland* case was decided.

23. Finally, at no time was the Petition designed to harass, embarrass or injure any person and certainly not the Court. It was my opinion that we were providing the Court with an opportunity to directly deal with the issue which undermined public confidence in the Court.

Dated this 11th day of March, 2002.

/s/ Edward R. Garvey
EDWARD R. GARVEY

Subscribed and Sworn to before me this 11th day of March, 2002.

/s/ Glenn Stoddard
GLENN STODDARD
Notary Public, State of Wisconsin
My Commission:

APPENDIX E

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

[Filed Mar. 24, 2000]

Case No. 00-CV-0797
Unclassified-Civil: 30703

ELECTIONS BOARD OF THE STATE OF WISCONSIN
132 East Wilson-Street
Madison, Wisconsin 53702,

Plaintiff,

v.

MARK J. BLOCK Individually and as an agent of the
Justice Wilcox for Justice Committee
18125 West Plateau Lane
New Berlin, Wisconsin 53146,

BRENT J. PICKENS Individually and as an agent of
Wisconsin Coalition for Voter Participation
W218 N14225 Hilltop Court
Richfield, Wisconsin 53076,

JAMES M. WIGDERSON Individually and as an officer of
Wisconsin Coalition for Voter Participation
6949 West Robinwood Lane
Franklin, Wisconsin 53132,

WISCONSIN COALITION FOR VOTER PARTICIPATION
a Wisconsin corporation
4806 Eldorado Lane
Madison, Wisconsin 53716,

JUSTICE WILCOX FOR JUSTICE COMMITTEE,
a Wis. Stat. § 11.05(2g) personal campaign committee
1620 North Golf Glen
Madison, Wisconsin 53704,

Defendants.

THE AMOUNT CLAIMED IS GREATER THAN THE AMOUNT CLAIMED UNDER WIS. STAT. § 799.01(1)(d).

COMPLAINT

The Elections Board of the State of Wisconsin (the Board), by its Executive Director, Kevin J. Kennedy, and, at the request of the Board, by James E. Doyle, Attorney General, John S. Greene, Assistant Attorney General, and Thomas L. Dosch, Assistant Attorney General, brings this complaint against Mark Block, Brent J. Pickens, James M. Wigderson, the Wisconsin Coalition for Voter Participation, and the Justice Wilcox for Justice Committee and alleges as follows:

THE PARTIES

1. The plaintiff, Elections Board of the State of Wisconsin, is an agency of the State of Wisconsin created under the authority of Wis. Stat. § 15.61. The Board's offices are located at 132 East Wilson Street, Madison, Dane County, Wisconsin. Pursuant to Wis. Stat. § 5.05(1), the Board is given the responsibility for the administration and enforcement of Wis. Stat. chs. 5-12 and the laws relating to elections and campaign financing.

2. The defendant Mark Block (Block) is an adult resident of New Berlin, Wisconsin. From on or about October 1, 1996, until on or about September 1, 1997, Block served as campaign manager for the defendant Justice Wilcox for Justice Committee. Block's duties for the Wilcox campaign included fundraising, preparing and implementing the campaign's budget, and preparing the campaign finance disclosure reports required under Wis. Stat. ch. 11. At all times relevant to this complaint, Block acted as agent for the Justice Wilcox for Justice Committee, and his actions are attributable to the Committee.

3. The defendant Brent J. Pickens (Pickens) is an adult resident of Richfield, Wisconsin. Pickens, together with defendant James M. Wigderson (Wigderson), founded the defendant Wisconsin Coalition for Voter Participation (WCVP) on or about March 13, 1997. At all times relevant to this complaint after the incorporation of WCVP, Pickens served as the executive director of WCVP. At all times relevant to this complaint Pickens resided at 4806 Eldorado Lane, Madison, Wisconsin, which was also WCVP's principal office.

4. The defendant James M. Wigderson (Wigderson), is an adult resident of Franklin, Wisconsin, and at all times relevant to this proceeding, since the incorporation of WCVP, has served as an officer and director of the defendant WCVP.

5. The defendant Wisconsin Coalition for Voter Participation is a Wisconsin nonstock corporation organized under Wis. Stat. ch. 181 and incorporated on March 13, 1997. At all times relevant to this proceeding, WCVP's principal offices were located at 4806 Eldorado Lane, Madison, Wisconsin.

6. The defendant Justice Wilcox for Justice Committee (JWJC) is a "personal campaign committee," within the meaning of Wis. Stat. § 11.01(15), with offices located at 1620 North Golf Glen, Madison, Wisconsin. JWJC was established on or about October 18, 1995, pursuant to Wis. Stat. § 11.05(2g), for the purpose of supporting the election of Jon P. Wilcox (Justice Wilcox) to the office of Wisconsin Supreme Court Justice in the April 1, 1997, election. At all times since JWJC's formation, its treasurers, who have had the responsibility for accepting campaign contributions and submitting certain campaign finance reports to the Board, have maintained their offices in Madison, Wisconsin.

FACTS

7. Upon information and belief, as of February 1997, the JWJC was actively considering undertaking a voter contact

effort in conjunction with the April 1, 1997, election. To that end, the JWJC had compiled a list of groups from whom it might rent voter names and addresses, and had engaged in discussions or preliminary negotiations with at least some of those sources about the possible rental of mailing lists.

8. Around this same time, Block discussed with Pickens and/or Wigderson a possible "independent" voter contact, or get-out-the-vote (GOTV) effort that would benefit the Wilcox campaign, and suggested they obtain legal counsel. Pickens and Wigderson subsequently advised Block of legal opinions they had obtained both from private counsel and from the Elections Board concerning the proposed GOTV effort, and otherwise kept Block informed of their activities regarding the effort.

9. The JWJC and Block acted in cooperation, consultation and in concert with WCVP, Pickens and Wigderson with respect to the GOTV effort. Upon information and belief, among other things, Block provided Pickens and Wigderson with the identity of potential sources of financial support for their voter contact effort, consulted with them regularly about their efforts, shared campaign documents with them, and faxed documents on their behalf to the American Education Reform Foundation, an organization then located in Indianapolis, Indiana.

10. Upon information and belief, based upon his knowledge of the effort Pickens, Wigderson and WCVP were planning, Block, on behalf of the JWJC, decided that the JWJC would not undertake its own voter contact effort. All the defendants agreed that WCVP would undertake a voter contact effort in lieu of the effort previously contemplated by Block and the JWJC.

11. Prior to the April 1, 1997, Wisconsin Supreme Court election, in furtherance of their GOTV project, Pickens, Wigderson and the WCVP made disbursements and incurred

obligations of approximately $200,000 on mailings and telephone calls to targeted voters. This GOTV effort included mailing approximately 354,000 postcards on or about March 27, 1997, and making approximately 250,000 telephone calls to postcard recipients or other targeted voters between March 27 and April 1, 1997. WCVP raised $200,500 from 12 contributors for its GOTV effort.

12. The purpose of WCVP's GOTV effort was to influence the election of Wisconsin Supreme Court Justice on April 1, 1997, by supporting the election of Justice Wilcox, and as such the postcard mailings and telephone calls referred to in the preceding paragraph constituted "contributions" within the meaning of Wis. Stat, § 11.01(6)(a).

FIRST CLAIM

Accepting Prohibited Corporate Contributions—JWJC and Block

13. The allegations of paragraphs 1-12 are restated and incorporated herein by reference.

14. Contrary to Wis. Stat. § 11.38(1)(a)1 and (b), between March 27, 1997, and April 1, 1997, the JWJC and Block accepted or received prohibited corporate contributions in the form of the WCVP's postcard mailings and telephone calls referred to in paragraph 11.

15. Wisconsin Stat. § 11.60(1), provides that any person, including any committee or group, who violates Wis. Stat. ch. 11, may be required to forfeit not more than $500 for each violation.

SECOND CLAIM

Making Prohibited Corporate Contributions—Pickens, Wigderson and WCVP

16. The allegations of paragraphs 1-12 and 14-15 are restated and incorporated herein by reference.

17. Contrary to Wis. Stat. § 11.38(1)(a), between March 27, 1997, and April 1, 1997, defendants WCVP, Pickens and Wigderson made, or caused to be made, corporate contributions in excess of $200,000 for the purpose of influencing the election of Justice Wilcox to the Wisconsin Supreme Court on April 1, 1997.

18. Wisconsin Stat. § 11.60(3), provides that any person including any committee or group, who makes any contribution in violation of Wis. Stat. ch. 11, may be required to forfeit treble the amount of the contribution or portion thereof which is illegally contributed. Wis. Stat. § 11.38(4) provides that any corporation which makes a contribution prohibited by that section shall forfeit double the amount of any penalty assessed under Wis. Stat. § 11.60(3).

THIRD CLAIM

Filing False Campaign Finance Reports—JWJC and Block

19. The allegations of paragraphs 1-12, 14-15 and 17 are restated and incorporated herein by reference.

20. Wisconsin Stat. § 11.06(1), requires each registrant under Wis. Stat. § 11.05, to make full financial reports of all contributions received, contributions or disbursements made, and obligations incurred, and each such report must contain the information described in that section. Additionally, Wis. Stat. § 11.12(4) requires each registrant to report contributions, disbursements and incurred obligations in accordance with Wis. Stat. § 11.20. At all times relevant to this proceeding, the JWJC has been a registrant required to make reports under Wis. Stat. § 11.05.

21. Pursuant to Wis. Stat. § 11.20, pre-election reports under Wis. Stat. § 11.05 for statewide spring elections must be filed with the Board no later than 8 days preceding the election and the first continuing report reflecting any subsequent contributions must be made no later than the following July 20th.

22. Wisconsin Stat. § 11.06(4)(d), provides that a contribution, disbursement or obligation made or incurred to or for the benefit of a candidate is reportable by the candidate or the candidate's personal campaign committee if it is made with the authorization, direction or control of or otherwise by prearrangement with the candidate or candidate's agent.

23. Contrary to Wis. Stat. § 11.27, on or about July 20, 1997, the JWJC and Block caused a report to be filed with the Board which falsely represented the amount of contributions received by the JWJC in that it failed to include the value of the postcard mailings and telephone calls referred to in paragraph 11, which constituted contributions to the JWJC.

24. Contrary to Wis. Stat. § 11.06(1) and (4)(d), the JWJC has never filed a report to the Board reflecting the value of the postcard mailings and telephone calls referred to in paragraph 11, which were contributed to the JWJC as a result of its coordination with the WCVP, Pickens and Wigderson referred to in paragraphs 7-10.

FOURTH CLAIM

Failure to File Reports of Late Contributions—
JWJC and Block

25. The allegations of paragraphs 1-12, 14-15 and 20-24 are restated and incorporated herein by reference.

26. Wisconsin Stat. § 11.12(5) requires a candidate's campaign committee to file a special report of any contribution of $500 or more received within 15 days prior to an election; such report must be fled within 24 hours of receipt of the contribution.

27. Contrary to Wis. Stat. § 11:12(5), JWJC and Block have failed to report the contributions to the campaign made by WCVP, Pickens and Wigderson, as described in paragraphs 11-12.

28. Wisconsin Stat. § 11.60(2), provides an additional penalty for any person, including any committee or group, who is delinquent in filing a report required by Wis. Stat. ch. 11, to forfeit not more than $50 or 1 percent of the annual salary of the office for which the candidate is being supported or opposed, whichever is greater, for each day of delinquency.

FIFTH CLAIM

Failure To Return Excess Contributions—JWJC

29. The allegations of paragraphs 1-12 and 14-15 are restated and incorporated herein by reference.

30. Contrary to Wis. Stat. §§ 11.26(11) and 11.38(6), the JWJC has failed to return or donate the value of the prohibited and therefore excess contributions made to JWJC described in paragraphs 11 and 14 to the donor, to the common school fund or to a charitable organization.

SIXTH CLAIM

Failure To Register—WCVP, Pickens and Wigderson

31. The allegations of paragraphs 1-12, 15 and 17 are restated and incorporated herein by reference.

32. At all times relevant to this proceeding, WCVP, Pickens and Wigderson have constituted a "committee" within the meaning of Wis. Stat. § 11.01(4).

33. As of no later than April 3, 1997, WCVP, Pickens and Wigderson had accepted contributions in excess of $200,000 and had made disbursements and incurred obligations of approximately $200,000 for the purpose of influencing the election of Justice Wilcox to the Wisconsin Supreme Court on April 1, 1997.

34. Wisconsin Stat. § 11.05(1), (2) and (6), require every committee or person which makes or accepts contributions, incurs obligations or makes disbursements in a calendar year

in an aggregate amount in excess of $25.00, to file a registration statement with the appropriate filing officer giving the information required by those sections. For Wisconsin Supreme Court elections the filing officer is the Board.

35. Contrary to Wis. Stat. § 11.05(1), (2), (6) and (12)(b), WCVP, Pickens and Wigderson failed to file a registration statement with the Board before accepting the contributions or making the disbursements and incurring the obligations referred to in this claim.

SEVENTH CLAIM

Failure To File Report—WCVP, Pickens and Wigderson

36. The allegations of paragraphs 1-12, 15, 17, 28 and 32-35 are restated and incorporated herein by reference.

37. Wisconsin Stat. § 11.06(l), requires each person or committee required to register under Wis. Stat. § 11.05, to make full financial reports of all contributions received, contributions or disbursements made, and obligations incurred, and each such report must contain the information described in that section.

38. Pursuant to Wis. Stat. § 11.20, pre-election reports under Wis. Stat. § 11.05 for statewide spring elections must be filed with the Board no later than 8 days preceding the election and the first continuing report reflecting any subsequent contributions must be made no later than the following July 20th.

39. Contrary to Wis. Stat. § 11.06(1), the WCVP, Pickens and Wigderson have never filed a report to the Board reflecting the contributions and disbursements referred to in paragraph 11.

EIGHTH CLAIM

Accepting Excessive Individual Contributions—WCVP, Pickens and Wigderson

40. The allegations of paragraphs 1-12, 15 and 32-33 are restated and incorporated herein by reference.

41. On information and belief, and contrary to Wis. Stat. § 11.26(4) and (14) between March 14, 1997, and April 3, 1997, WCVP accepted individual financial contributions in excess of $10,000 and failed to return or donate them as required by Wis. Stat. § 11.26(11).

NINTH CLAIM

Accepting Prohibited Corporate Contributions—WCVP, Pickens, and Wigderson

42. The allegations of paragraphs 1-12, 15 and 32-33 are restated and incorporated herein by reference.

43. Contrary to Wis. Stat. § 11.38(1)(a)l and (b), between March 14, 1997, and April 3, 1997, WCVP, Pickens and Wigderson accepted financial contributions from corporations to support its GOTV efforts.

44. In addition, Wis. Stat. § 11.38(6) requires any individual who receives funds in violation of that section to promptly return such funds to the contributor or donate the funds to the common school fund or a charitable organization.

TENTH CLAIM

Anonymous Communications—WCVP, Pickens and Wigderson

45. The allegations of paragraphs 1-12, 15 and 17 are restated and incorporated herein by reference.

46. Contrary to Wis. Stat. § 11.30(2), none of the 354,000 postcards referred to in paragraph 11 which WCVP, Pickens

and Wigderson caused to be mailed to Wisconsin voters on or about March 27, 1997, contained any identification of the source of the postcards.

47. On information and belief, and contrary to Wis. Stat. § 11.30(2), none of the approximately 250,000 telephone calls refereed to in paragraph 11 which WCVP, Pickens and Wigderson caused to be made between March 27, 1997, and April 1, 1997, as part of their GOTV effort, contained any identification of the source of the telephone calls.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff respectfully requests:

1. An injunction requiring the defendants to comply with the appropriate campaign registration and reporting provisions of Wis. Stat. ch. 11, and to return or donate the excess contributions or prohibited contributions as provided for in Wis. Stat. §§ 11.26(11) and 11.38(b).

2. The forfeitures provided for in Wis. Stat. §§ 11.38(4), 11.60(1), 11.60(2), and 11.60(3) for each daily violation alleged herein, together with the penalty assessments required by Wis. Stat. § 165.87(2).

3. The costs and disbursements of this action.

4. Other relief as the court deems appropriate.

Dated this 24th day of March, 2000.

ELECTIONS BOARD OF THE
STATE OF WISCONSIN

/s/ Kevin J. Kennedy
KEVIN J. KENNEDY
Executive Director
State Bar No. 1017591

132 East Wisconsin Street, Suite 200
P.O. Box 2973
Madison, Wisconsin 53101-2973
(608) 266-8087

JAMES E. DOYLE
Attorney General

JOHN S. GREED
Assistant Attorney General
State Bar No. 1002897

THOMAS L. DOSCH
Assistant Attorney General
State Bar No. 1017026
Attorneys for Plaintiff
State of Wisconsin

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3936 & (608) 266-0770

APPENDIX F

SUPREME COURT OF WISCONSIN

Appeal No. 97-0270

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et. al.*,
Respondents.

AFFIDAVIT OF CARL GOBEL

STATE OF WISCONSIN)
)ss.
COUNTY OF MILWAUKEE)

NOW COMES Carl Gobel, being first duly sworn, upon oath, deposes and states as follows:

1. I am an adult resident of Milwaukee, Wisconsin and I have lived in this city for 12 years. I attended Milwaukee Public Schools for 14 years.

2. After 10 years as a school administrator, the Administrators and Supervisors Council (ASC) hired me in 1982 as Executive Director to represent its members. The ASC represents mid-management MPS administrators and I worked in that capacity for 15 years until my retirement.

3. In addition to my service to protect the quality of MPS, I have two granddaughters who attends MPS and they provide added incentive to offer whatever help I can give to maintain the quality of Milwaukee Public Schools.

4. Because of my work with ASC, I am very familiar with the funding of public schools and it is my firmly held belief that the voucher program in Milwaukee drains millions of dollars from MPS and directs the money to private for-profit and religious schools. My conclusion is that vouchers benefit comparatively few school children at the expense of the many. It is my belief that children who remain in MPS seem to have less money available for much needed services.

5. I was a plaintiff in the case *Jackson v. Benson*. In addition to my beliefs set forth above, I strongly support the separation of church and state and this belief motivated me to sign on as a plaintiff to challenge the Milwaukee voucher program as a violation of the establishment clause of the Wisconsin and United States constitutions. I enthusiastically supported that litigation.

6. I am a student of, and a participant in, politics in Wisconsin and I watched with interest the race between Justice Jon Wilcox and Milwaukee attorney Walter Kelly. Because I was a plaintiff in the Jackson case, I paid particular attention to this Supreme Court election. I became aware of the anonymous postcard campaign against Mr. Kelly that occurred a few days prior to the election and know that the senders attempted to discredit Mr. Kelly by associating him with the American Civil Liberties Union to which I belong. I followed the Elections Board investigation of that mailing in the media and was not surprised to find that pro-voucher advocates were behind the mailing and other campaign activities. I was disappointed when the Supreme Court ruled against us.

7. At the time the decision was handed down, I felt the decision by the Supreme Court was inappropriate because Justice Wilcox participated in the decision even though he may have been the beneficiary of illegal anonymous post cards and possibly other activity then under investigation by

the State Elections Board. I was unaware of any remedy available to me to challenge the Court's decision.

8. When I learned in late November of 2001 that there was a possibility of petitioning the Supreme Court to vacate the voucher decision based on the participation of Justice Wilcox, I volunteered to participate and to discuss this with other plaintiffs.

9. I, along with Wendell Harris, Father Tom Mueller, Warner Jackson, the person after whom this case is named, met with attorney Ed Garvey, and read the draft petition in mid-December 2001. After reading the draft and discussing it with Ed Garvey, I was satisfied that we had an opportunity to properly raise the issue that was troubling me with the Supreme Court. It was my belief that my rights as a citizen had been violated. I authorized Mr. Garvey to add my name to the petition in late December 2001.

10. It is my recollection that the Cleveland case was discussed briefly but it would be my sworn testimony, if provided an opportunity to testify, that the Cleveland case had nothing whatsoever to do with my decision to become a petitioner in this matter. My concern was and is with the Milwaukee public school system. I would also testify, if provided an opportunity that I was not motivated to injure or harass the Court or Justice Wilcox. My only concern related to what I thought was a denial of my due process rights.

11. I was alarmed to learn that the petitioners, all people I believe to be of modest income, were sanctioned by the Supreme Court and ordered to pay attorney's fees for the State. I was surprised to learn that the law firm that had represented some of the persons accused of illegal campaign activity had been substituted for the Attorney General in opposing our petition and asking for sanctions. The idea of paying legal fees for a private law firm was upsetting to me and because of this decision, I would be very reluctant to

petition this Supreme Court again. It was my belief that we had a right to petition the Court as we would any branch of government.

12. I am represented in this request for reconsideration by Attorney Mark Frankel, who has agreed to represent me and the other petitioners on a *pro bono* basis.

Dated this 9th day of March, 2002.

/s/ Carl Gobel
CARL GOBEL

Subscribed and Sworn to before me
This 9th day of March, 2002

/s/ Edward R. Garvey

Notary Public, State of Wisconsin
My Commission is permanent

SUPREME COURT OF WISCONSIN

Appeal No. 97-0270

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et. al.*,
Respondents.

AFFIDAVIT OF THOMAS MUELLER

STATE OF WISCONSIN)
)ss.
COUNTY OF MILWAUKEE)

NOW COMES Thomas Mueller, being first duly sworn, upon oath, deposes and states as follows:

1. I am an adult resident of the City of Milwaukee, State of Wisconsin, and am the pastor of a Milwaukee church. I have worked in Milwaukee for 18 years. I have lived in Milwaukee for over 45 years.

2. My children attended Milwaukee public schools for a combined total of 29 years and I am deeply committed to the efforts to maintain high quality public schools. My grandson is an MPS student. I am very involved as an activist in issues of public education in Milwaukee and elsewhere.

3. I was a plaintiff in the lawsuit brought to challenge the Milwaukee voucher program. It was my belief then and now that the voucher program is harmful to the

public schools. I believe that a child in Milwaukee, attending public school, has inferior facilities to children of surrounding suburban schools. In my opinion, the voucher program diverts much needed funds from MPS to the private schools and I oppose the program. Eventually, and I believe inevitably, expansion of this program statewide will become a financial disaster for the state and public education. For these reasons, I was an enthusiastic plaintiff in *Jackson v. Benson*.

4. I also believe that tax dollars going to religious schools violates the constitution of this State and of these United States. I obviously have nothing against religious schools. I myself attended religious schools as a child; but the state should not, in my view, subsidize the educational program and the mission of any sect or group of sects. I believe that, in the long run, such state subsidy compromises freedom of religion.

5. I was well aware of the Wilcox-Kelly race for the Supreme Court and by watching the debates it was clear to me that the outcome of that race might well determine the fate of our lawsuit, *Jackson v. Benson*, challenging vouchers. The debates I saw on television between candidate Kelly and Justice Wilcox focused, in my view, primarily on the issue of "choice" or "vouchers."

6. I became aware of the postcard campaign against candidate Kelly on the eve of the election. As a plaintiff and as a citizen, I wanted to know who sent the postcards and who paid for them. As a result, I followed as best I could the complaint filed by Kelly and the investigation of the Elections Board. I was not surprised to learn that the postcards had been funded by advocates of vouchers. The national notoriety of

our lawsuit, the involvement of big money from the Bradley Foundation, the hiring of Kenneth Starr to argue the case suggested to me that pro-voucher advocates believed that the election of Justice Wilcox was key to their efforts to maintain vouchers.

7. When the announcement was made that Justice Wilcox had accepted responsibility, I concluded that he should not have participated in the Jackson case.

8. I had no idea that we could petition the Supreme Court to set aside the decision based on the participation of Justice Wilcox until December of 2001. I met with Ed Garvey and Carl Gobel, read a draft of the petition, and I enthusiastically agreed to have Mr. Garvey represent me as a petitioner in asking the Supreme Court to rehear this matter.

9. At no time did the timing of the so-called Cleveland case influence me in my decision to file the petition. It is my belief that a decision in the Cleveland case would have no impact on the Milwaukee voucher program.

10. At no time was there any discussion with my fellow petitioners or counsel that we would file this petition to harass or injure anyone or the Court itself.

11. I was very surprised to learn that I had been sanctioned by the Court for filing the petition late when it was filed about a month after I learned that I had a right to file a petition. To order me to pay the legal fees of a law firm I could never afford to hire on my own, leads me to the conclusion that only the wealthy should dare to question the decisions of the courts. I will be very reluctant to participate in the judicial process again.

12. Attorney Mark Frankel has agreed to represent me *pro bono* in this request for reconsideration.

Dated this 9th day of March, 2002.

/s/ Thomas J. Mueller
FATHER THOMAS MUELLER

Subscribed and Sworn to before me
This 9th day of March, 2002

/s/ Edward R. Garvey
Notary Public, State of Wisconsin
My Commission is permanent

SUPREME COURT OF WISCONSIN

Appeal No. 97-0270

WARNER JACKSON, *et al.*,
Petitioners,

v.

JOHN T. BENSON, *et. al.*,
Respondents.

AFFIDAVIT OF WARNER JACKSON

STATE OF WISCONSIN)
)ss.
COUNTY OF MILWAUKEE)

NOW COMES Warner Jackson, being first duly sworn, upon oath, deposes and states as follows:

1. I am an adult resident of Milwaukee, Wisconsin, and have lived in the City for over 50 years. I am a customer service manager. I am the same Warner Jackson that was the lead plaintiff in the lawsuit that bears my name: *Jackson v. Benson.*

2. I decided to file the original suit because I had two children in the MPS system and I was convinced that the voucher program directly affects their education in a negative way. To permit millions of tax dollars to flow from MPS to private and religious schools is, in my opinion, an attack on the education of my children.

3. I was unaware of my right to challenge the decision of the Supreme Court in my case until December of 2001 when I met with Wendell Harris and attorney Ed Garvey. When I learned that I could challenge the decision I jumped at the opportunity because I believe that my rights were violated as a result of the participation of Justice Wilcox in the case. I was forced to speculate about his involvement with the pro-voucher forces until he publicly announced that he would pay a fine and would take responsibility for his Committee's wrongdoing. As I recall, that admission came in the Spring of last year.

4. At no time did I consider the Cleveland case in my decision about whether or not to petition this Court. I am not familiar with Cleveland or the case. My sole concern is with the Milwaukee Public Schools. I believe that diverting money to religious schools violates our constitutional division between church and state.

5. At no time did we discuss the impact of this petition on any individual or the Court itself. I had no desire or intent to injure or harass Justice Wilcox or the Supreme Court. I was a petitioner because it was my understanding that citizens have a right to file such petitions. As stated earlier, I did not know that until December of last year.

6. When I learned that my fellow petitioners and I were supposed to pay the legal fees for a private law firm, I felt that I was being punished for exercising my right to petition government. The message I took from this decision was that no one should challenge the Supreme Court. This message scares me.

7. I am represented by attorney Mark Frankel who has agreed to represent me without fee.

Dated this 9th day of March, 2002.

/s/ Warner Jackson
WARNER JACKSON

Subscribed and Sworn to before me

This 9th day of March, 2002
/s/ Edward R. Garvey
Notary Public, State of Wisconsin
My Commission is permanent